Supreme Court, U.S.
FILED
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORD LIFE INSURANCE COMPANY,
Petitioner,

v.

JOYCE MILLER,
Administratrix for the ESTATE OF MEARL M. MILLER,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama Supreme Court, by (a) refusing to recognize the traditional distinction between general and soliciting agents, and instead, holding that Petitioner could be contractually bound by its soliciting agent to terms contrary to Petitioner's written insurance policy, (b) retroactively applying this newly fashioned agency law, (c) refusing to enforce a statute which would mandate summary judgment in Petitioner's favor, and (d) applying the less onerous "breach of contract" standard when holding respondent had presented *prima facie* evidence of Petitioner's bad faith, deprived Petitioner of its right to due process?

RULE 29.1 DISCLOSURE STATEMENT

Petitioner Ford Life Insurance Company ("Ford Life") is a wholly-owned subsidiary of American Road Insurance Company. American Road Insurance Company, in turn, is a jointly owned subsidiary of Ford Motor Credit Company ("FMCC") and Ford Holdings, Inc. FMCC and Ford Holdings, Inc., in turn, are wholly owned subsidiaries of Ford Motor Company. Ford Life has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Ford Life Insurance Company, ("Ford Life") respectfully petitions this Court for a Writ of Certiorari to review the Judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The February 24, 1995 opinion of the Supreme Court of Alabama reversing in part the Summary Judgment of the trial court is unreported and reproduced at App. A. The Alabama Supreme Court's May 12, 1995 Order overruling Petitioner's Application for Rehearing was rendered without opinion and is reproduced at App. B. The trial court's April 27, 1993 Order granting Petitioner's Motion for Summary Judgment is unreported and reproduced at App. C.

JURISDICTION

Petitioner raised its Constitutional objection to the Alabama Supreme Court's unforeseen departure from established Alabama common law and the Court's refusal to enforce an applicable statute in its Application for Rehearing; Petitioner's Application for Rehearing is reproduced at App. D. The Supreme Court of Alabama overruled Petitioner's Application for Rehearing on May 12, 1995. This Petition is being filed within ninety (90) days of the denial of rehearing. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of . . . property, without due process of law. . . ."

INTRODUCTION

This case presents the latest installment in the continuing saga of the Alabama Supreme Court's arbitrary, unpredictable and inconsistent review of a trial court's dispositive rulings regarding claims for punitive damages.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) this Court approved the Alabama punitive damage system. 499 U.S. at 20-21. At issue in *Haslip* was the adequacy of Alabama's post-judgment review of jury awarded punitive damages in protecting the defendant's right to due process.[1]

However, since *Haslip*, this Court has been bombarded with pleas to revisit the constitutionality of Alabama's punitive damage system[2]—these petitions document the unbridled proliferation of jury awarded punitive damages and the Alabama Supreme Court's remarkable disregard for a defendant's, especially an out-of-state corporate defendant's, due process rights when reviewing punitive damage awards. This petition demonstrates that when punitive damages against an out of state corporate defendant are at issue, the Alabama Supreme Court no longer suspends manifesting its disdain for due process until the post-judgment verdict review; instead, the Alabama Supreme Court, unchecked by this Court, is growing increasingly bold in its unabashed disregard of the due process rights of out of state corporate defendants. In the case *sub judice*, the Alabama Supreme Court overturned the trial court's Summary Judgment on plaintiff's bad faith claim (which requests punitive damages), only after the Court: (a) refused to recognize the traditional distinction between general and soliciting agents, (b) unforeseeably manipulated a previously limited exception to the distinction between general and soliciting agents so that the "exception" now supersedes the rule, (c) retroactively applied its newly fashioned law (to Petitioner's great detriment), and (d) refused to enforce an applicable statute (§ 27-14-7 *Code of Alabama* (1975)).

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[1] The *Haslip* Court deemed the post-judgment review as mandated in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989) to sufficiently protect a defendant's right to due process. *Haslip* at 21-22.

[2] *See for example InterContinental Life Ins. Co. v. Lindblom*, July, 1992; *Sear's Roebuck & Co., et al. v. Harris, et al.*, No. 93-1589; *BMW of North America, Inc. v. Gore*, No. 94-896.

Even more disturbing, the Court reversed Summary Judgment on respondent's bad faith claim without even discussing or disclosing how it came to pass that respondent met the onerous burden of presenting a *prima facie* case of bad faith. Instead, the Court reversed Summary Judgment on respondent's bad faith claim merely because it found respondent had presented sufficient evidence to support its breach of contract claim.

The Alabama Supreme Court, by changing Alabama laws to accommodate respondent's claim, retroactively imputing knowledge of its imprudent ruling to Petitioner, and reversing the trial court's Summary Judgment on a claim requesting punitive damages without referencing any evidence of record to support such a ruling, denied Petitioner its right to due process.

STATEMENT OF THE CASE

A. Statement of the Facts.

On February 28, 1989, decedent, Mr. Miller purchased an automobile from Treadwell Ford (hereinafter "Treadwell"). Mr. Miller's daughter, Paula Goss, and her husband Howard Goss, accompanied him to Treadwell.

During the initial negotiations regarding Mr. Miller's purchase of the Treadwell automobile, a Treadwell salesman asked Mr. Miller whether he wanted to purchase credit life insurance coverage on the vehicle. Such coverage was available, at the purchaser's option, through Petitioner, Ford Life Insurance Company (hereinafter "Ford Life" or "Petitioner"). Mr. Miller had purchased credit life insurance on every vehicle he had ever purchased, however, the Gosses testified that Mr. Miller declined because he could not afford the premium and because he had emphysema. The Gosses further testified that another Treadwell employee, presumably from the insurance department, advised Mr. Miller that if he did not buy the credit life coverage, he could not finance the purchase of the car.

According to the Gosses, Mr. Miller refused to purchase the vehicle on those terms and made preparations to leave

the dealership. However, the Treadwell employee said, "Wait a minute. We will strike up something else." Some time thereafter, Mr. Miller and the Treadwell salesman reached an agreement whereby Mr. Miller purchased both the vehicle and credit life insurance. Neither Goss recalls what transpired after the Treadwell salesman offered to "strike up something else" that caused Mr. Miller to change his mind regarding the purchase of credit life insurance.

Irrespective of the alleged misrepresentation by the Treadwell employee(s), paragraph eight of the Installment Sales Contract signed by Mr. Miller specifies that the purchase of credit life insurance is optional.[3] Mr. Miller signed this paragraph indicating he wanted to purchase credit life insurance and acknowledging that he understood the purchase of credit life insurance was optional (C-26, 143, 1108, 1115, 1116); Paula Goss testified that Miller knew the credit life insurance was optional (C-1109, 1110); and, Miller's widow admitted that, shortly after purchasing the insurance, Miller stated he knew, before purchasing the insurance, he did not have to do so to obtain financing. (C-1085, 1086).

To be eligible for credit life insurance coverage through Ford Life, all applicants must sign the following health statement embodied in the Certificate of Insurance: "I hereby declare that to the best of my knowledge, I am in good health." (C-23). Ford Life relies upon the applicant's honesty in signing this good health statement and does not issue coverage to those who fail and/or refuse to sign this statement.[4]

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[3] "8. INSURANCE (Optional): Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional cost, which is included in the Amount Financed."

[4] Diane Letizio, Credit Life supervisor for Ford Life testified that:

> "Ford Life Insurance Company believed and relied upon the truthfulness of the 'good health' declaration by Mearl M. Miller

At the time he signed the statement of good health, Mr. Miller was, in fact, in very poor health.[5]

Both Gosses testified they could not identify the Treadwell employee, who, they claim, told Miller he had to purchase credit life insurance in order to finance the purchase of the car. (C-570-71; 769; 787; 1113-1114). However, at the time Miller purchased the insurance, Robert Wayne Sparks was the only Treadwell employee designated by Petitioner as its "soliciting agent," and, Sparks, by the express terms of: (a) the agency agreement between Sparks and Petitioner,[6] (b) the controlling agree-

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in issuing the credit life insurance coverage specified and would not have issued such coverage had such 'good health' declaration had not been executed by him.

* * * *

Ford Life Insurance Company would not have issued the credit life insurance coverage to Mearl M. Miller had it known he had emphysema, or had it known that he had chronic obstructive pulmonary disease as of the date of issuance of such coverage, or had it known that he was not in fact in good health as of the date of issuance of such coverage." (C-253-256).

[5] Miller was receiving social security disability benefits, had retired from Ingalls Shipbuilding for medical reasons, and was suffering from disabling asthmatic bronchitis, severe emphysema, various other chronic obstructive pulmonary diseases, and a duodenal ulcer. (C-131; 222; 271; 273-274; 299-300; 1084).

Just weeks before signing the Good Health Certificate, Miller spent a week in a local hospital, was treated for acute exasperation of his COPD secondry purulent bronchitis, and had received high doses of various bronchodilator medications. (C-188; 191; 305-308; 584; 1129).

Paula Goss even stated that he [Miller] "did not know from this day to the next if he would still be alive or not." (C-1103).

[6] The Agency Agreement between Petitioner and Sparks stated: "The agent has no authority to solicit any form of insurance except in accordance with the terms of this agreement, or to countersign or deliver any policy of insurance for the company other than those so prepared by the company and furnished by the company to the agent; and has no authority to change, alter, vary or waive any of the terms or conditions contained in such policy." (C-240-246; 770; 787).

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ment between Treadwell and Petitioner,[7] and (c) Sparks' registration with the Alabama Department of Insurance,[8] did not have authority to make any additional representations or otherwise modify the terms of the credit life policy. (C-240-246; 770; 787; 979).

On January 9, 1990, Mr. Miller died.

On March 5, 1990, Central Bank of the South, which financed the purchase of the car and was the primary beneficiary of the policy, notified Petitioner of Mr. Miller's death. (C-264). On May 9, 1990, after investigating Mr. Miller's voluminous medical records, Petitioner, based upon the express terms of the insurance contract,[9] and established Alabama law,[10] rejected Central Bank's claim

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[7] The Controlling Agreement between Treadwell (Sparks' employer) and Ford Life stated: "No agent is authorized to alter or amend this Policy or any Certificate issued hereunder, to waive any conditions or restrictions contained herein, to extend the time for paying a premium, or to bind Ford Life by making any promises or representations or by giving or receiving any information. This Policy or any certificate issued hereunder can not be amended or altered or its conditions waived in any respect except by written agreement endorsed herein or attached hereto and signed by an authorized officer of Ford Life." (C-250; 390).

[8] David C. Brown, Field Sales Manager for Ford Life for over fourteen years, testified "Mr. Sparks was registered as a limited agent, not a general agent, of Ford Life Insurance Company, with the Department of Insurance of the State of Alabama. . . [and] Ford Life Insurance Company has not ratified nor condoned Mr. Sparks' deviation from the scope of his agency authority as regards representations made by him to Mearl M. Miller, or anyone else, which deviated from the express terms of the group policy issued to Treadwell Ford or underlying certificates of insurance issued pursuant to such group policy." (C-242-243).

[9] As set forth hereinabove, to be eligible for credit life insurance coverage through Ford Life, all applicants must sign a health statement embodied in the Application that states "I hereby declare that to the best of my knowledge, I am in good health." Ford Life relies upon these statements of good health in issuing credit life insurance coverage.

[10] § 27-14-7 *Code of Alabama* (1975) states:

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations there-

and forwarded copies of the rejection letter to respondent's Estate and to Treadwell. (C-265; 391).

To date, respondent has never submitted to Ford Life any claim form or proof of loss seeking benefits under the policy. (C-129; 392).

On May 6, 1992, Joyce Miller, as Administratrix of Mr. Miller's Estate, and Paula Goss, individually, sued Ford Life and Treadwell alleging, *inter alia,* fraudulent representations, breach of contract, and bad faith. Almost one year later, the Plaintiffs attempted to amend the Complaint to add numerous new claims, and, apparently, to join Joyce Miller, individually, as a Plaintiff.

B. The Decision Below.

On April 27, 1993, the trial court denied Plaintiffs' Amendment and granted Summary judgment in favor of both Defendants on all Counts of the Original Complaint. App. C, 11a.

On February 24, 1995, the Supreme Court of Alabama issued its decision in this case. App. A, 1a. The Court

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for, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent;

(2) Material either to the acceptance of the risk of to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

(b) No plea of misrepresentation or fraud in connection with the issuance of a life insurance policy or annuity contract shall be filed unless accompanied by a payment into court of all premiums paid on the policy or contract.

upheld the trial court's refusal to allow Amendments to the Complaint, its Summary Judgment on all counts against Treadwell, and Summary Judgment on all counts against Petitioner except respondent's (as administrator of the estate of Mearl Miller) breach of contract and bad faith claims. The Alabama Supreme Court held:

> "Although we are aware that Mr. Miller signed a Certificate stating that he was in good health, even though he was not in good health, the facts alleged in this case take it out of the ordinary situation." App. A, 6a.

The Court then cited *National Life & Accident Ins. Co. v. Allen*, 285 Ala. 551, 234 So.2d 567 (1970) to support its declaration that:

> "An insurance company cannot defend its refusal to pay benefits on grounds that the insured made a misrepresentation in the Application if the misrepresentation was the fault of the agent and that fault was without participation by the insured." App. A, 6a.

The Court continued:

> "[*t*]*he jury could find that the only misrepresentation made by Mr. Miller came when he signed a Good Health Certificate.*" (Emphasis added). App. A, 7a.

Accordingly, the Court concluded,

> "we disagree with the trial court's conclusion that the Ford Life representative, as a soliciting agent, could not legally bind the company. The evidence, viewed in a light most favorable to Mrs. Miller, indicates that the Ford Life representative knew that Mr. Miller had health problems, but issued the policy anyway." App. A, 7a.

After concluding respondent had presented sufficient evidence to rebut Petitioner's showing that no contract existed, the Alabama Supreme Court, without any discussion regarding respondent's much more onerous evidentiary burden needed to proceed with her bad faith claim, reversed the trial court's Summary Judgment thereon, stating:

> "[b]ecause we reverse as to the breach of contract claim, we also reverse the Summary Judgment as to the bad faith claim." App. A, 7a.

On March 17, 1995, Petitioner applied for rehearing on the Alabama Supreme Court's ruling regarding respondent's bad faith claim, and, in support therefor, filed a brief specifying how the Court's February 24, 1995, opinion deprived Petitioner of its constitutional rights. App. D, 40a.

On May 12, 1995, the Alabama Supreme Court, without rendering an opinion, overruled Petitioner's Application for Rehearing. App. B, 10a.

PRESENTATION OF THE FEDERAL QUESTION

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process law. . . ."

The Alabama Supreme Court reversed Summary Judgment on respondent's contract claim because the Court refused to recognize the traditional distinction between general and soliciting agents, manipulated an inapplicable exception to the established rule that insurers are not bound by the independent actions of their soliciting agents, while at the same time it refused to enforce an applicable statute, which would have mandated Summary Judgment in Petitioner's favor, thereafter, the Court retroactively imputed knowledge of its departure from established law to Petitioner at the time it denied Central Bank's claim. Incredibly, based upon its newly fashioned law, the Alabama Supreme Court held, without explanation, respondent had presented a *prima facie* case of Petitioner's bad faith.

In its Answer to respondent's Complaint, Petitioner objected to respondent's claim for punitive damages as a violation of its rights to due process. Petitioner raised the particular due process challenge to the Alabama Su-

preme Court's startling ruling at the first possible opportunity—in its Application for Rehearing. Accordingly, the federal question was timely and properly raised. As this Court explained in *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 86 N. 9 (1979), "federal claims . . . have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law." *See also, Brinkeroff-Faris Trust Co. v. Hill,* 281 U.S. 673, 677-78 (1930) (Federal claim first raised on Petition for Rehearing in State Supreme Court was timely "since it was raised at the first opportunity"); *Saunders v. Shaw,* 244 U.S. 317, 320 (1917) (violation of Fourtenth Amendment for State Supreme Court to reverse trial court in such a way as to deny litigant an opportunity to present evidence—"it would leave a serious gap in the remedy for infraction of [federal] constitutional rights if the party aggrieves in such a way could not come here").

According to *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 485 (1975), this Court's jurisdictional requirement that a judgment be final is satisfied because the Alabama Supreme Court's judgment regarding the viability of respondent's bad faith claim is final and is not subject to further review by the trial court. Petitioner may prevail at trial on respondent's bad faith claim, however, if the Alabama Court erroneously ruled (as Petitioner vigorously contends), there should be no trial on respondent's bad faith claim at all, and postponement of review by this Court until after Petitioner suffers the crippling costs of a jury trial on respondent's bad faith claim, according to *Cox,* would deny Petitioner of its right to due process.

This Court, mindful of the hardship imposed by punitive damages, has not, in the past, hesitated to limit or even bar the recovery of punitive damages if necessary to further a strong countervailing interest. *See, e.g., City of Newport v. Facts Concerts, Inc.,* 453 U.S. 247 (1981) (municipalities are immune from punitive damages); *International Board of Elec. Workers v. Foust,* 442 U.S.

42 (1979) (punitive damages may not be asserted against union that breaches its duty of fair representation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (punitive damages may not be assessed in defamation action without proof of "actual malice"). Petitioner's brief presents just such a countervailing interest—the right of an out-of-state corporate defendant to preserve, unmolested by the Alabama Supreme Court, its right to due process.

SUMMARY OF ARGUMENT

Respondent, as administrator of decedent, Mearl Miller's estate, sued Petitioner, a credit life insurer, for breach of contract, bad faith and fraud regarding a credit life insurance policy which Petitioner, based on false information, had issued to decedent. The trial Court granted Summary Judgment in favor of Petitioner of Petitioner on all counts; the Alabama Supreme Court reversed and remanded respondent's breach of contract and bad faith claims. In so doing, the Alabama Supreme Court ignored established Alabama law which prohibits soliciting agents from independently negotiating and binding their principals to a contract that is manifestly different from, and in fact diametrically opposed to, the clear and unambiguous terms of the written contract drafted by the principal.

The Court further refused to enforce § 27-14-7 *Code of Alabama* (1975), a statute directly on point, which prohibits recovery on an insurance contract if the insured fraudulently misrepresents his health in the insurance application or if the insurer in good faith would not have issued the policy had it been apprised of the "true facts" regarding the applicant's health at the time the policy was issued.

The Alabama Supreme Court refused to even acknowledge that its holding departed from established Alabama law. Instead, the Court attempted to rationalize its ruling by manipulating an exception to the rule that solicit-

ing agents cannot be deemed to bind their principals in contract. As interpreted by the Alabama Supreme Court, the "exception" now supersedes the rule. As applied by the Alabama Supreme Court, the historically recognized distinction between general and soliciting agents was abolished retroactively. Simultaneously, the Court created a standard of review in insurance cases whereby it, *sua sponte*, and thus, arbitrarily, will determine whether an insurer is entitled to enforcement of § 27-14-7 *Code of Alabama* (1975).

Finally, as if it had not yet bagged its limit of constitutional abuses in one ruling, the Alabama Supreme Court reversed Summary Judgment on respondent's bad faith claim simply "[b]ecause we reverse as to the breach of contract claim." App. A, 8a. When the Court, via Petitioner's Application for Rehearing, was given the opportunity to correct its error, by, at the very least, identifying the evidence of record upon which it premised reversal of Summary Judgment on respondent's bad faith claim, it declined to do so, and, instead, overruled Petitioner's Application for Rehearing without opinion—refusing even to acknowledge the distinction between evidence sufficient to proceed with a breach of contract claim and the much more onerous evidentiary burden necessary to proceed with a bad faith claim.

Petitioner respectfully submits that the Alabama Supreme Court, in abolishing the traditional distinction between general and soliciting agents, refusing to enforce a clear and unambiguous statute, retroactively imputing knowledge of this unforeseeable departure from established law to Petitioner at the time it refused to pay a claim on the policy at issue, and refusing to explain how respondent met its evidentiary burden of presenting a *prima facie* case of Petitioner's bad faith, trampled Petitioner's rights to due process.

The inexplicableness of the Alabama Supreme Court's ruling is manifested by its treatment of Treadwell, a local car dealership whose employees made the misrepresenta-

tions upon which respondent based her complaint. The trial court had granted Summary Judgment on respondent's fraud and breach of contract claims against Treadwell; the Alabama Supreme Court affirmed. Citing *Smith v. Equifax Serv., Inc.*, 537 So.2d 463 (Ala. 1988), the Court held "an agent cannot be held liable for his principals breach of contract." App. A, 5a. Apparently, the Alabama Supreme Court, when considering the liability of a local defendant is less eager to manipulate Alabama law so as to resucitate claims for relief properly laid to rest by the trial court.

The Alabama Supreme Court's erratic adherence to precedent has placed Petitioner in the perilous and prejudicial position of defending a claim seeking punitive damages for an act committed by a Treadwell employee, while Treadwell, conversely, is completely exculpated for the acts of its own employee.

The Court's disparate treatment of Treadwell and Ford Life deprives Ford Life of affirmative defenses to respondent's Complaint and of cross claims against Treadwell for violation of the controlling agreement between Treadwell and Ford Life.[11]

This Court is no stranger to the potential constitutional pitfalls of submitting a claim for punitive damages to a jury and has recently held that the imposition of punitive damages "is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Honda Motor Co. v. Oberg*, 114 S. Ct.

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[11] The Controlling Agreement between Treadwell and Ford Life states: "No agent is authorized to alter or amend this Policy or any Certificate issued hereunder, to waive any conditions or restrictions contained herein, to extend the time for paying a premium, or to bind Ford Life by making any promises or representations or by giving or receiving any information. This Policy or any Certificate issued hereunder can not be amended or altered or its conditions waived in any respect except by written agreement endorsed herein or attached hereto and signed by an authorized officer of Ford Life." (C-250; 390).

2331, 2342 (1994). This case presents the Court with the unique opportunity of protecting an out-of-state corporate defendant's due process rights before it undergoes a protracted and financially crippling trial, while at the same time affording the Court an opportunity to comment upon the Alabama Supreme Court's departure from the precepts set forth in *Haslip*.

REASONS FOR GRANTING THE PETITION

I. THE ALABAMA SUPREME COURT'S REVERSAL OF SUMMARY JUDGMENT ON RESPONDENT'S BREACH OF CONTRACT CLAIM WAS PREMISED UPON THE COURT'S UNANTICIPATED DEPARTURE FROM ESTABLISHED ALABAMA LAW.

In reversing Summary Judgment on respondent's breach of contract claim, the Alabama Supreme Court held: "*We disagree with the trial court's conclusion that the Ford Life representative, as a soliciting agent, could not legally bind the company.*" App. A, 7a. Prior to the Alabama Supreme Court's stated disagreement with the trial court's conclusion, the settled law in Alabama had been exactly as the trial court held—soliciting agents did not have the authority to bind insurers to terms expressly contrary to those contained in the contract. *See, Powell v. Prudential Insurance Co. of America*, 45 So. 208 (1907). In *Powell*, decedent applied for life insurance and signed a good health certificate indicating that to the best of his knowledge he was in good health. The policy issued to decedent expressly stated that decedent's application became part of the contract. One month after applying for insurance, Powell became fatally ill, and, shortly thereafter died. Prudential denied a claim tendered by Powell's estate because Powell was in bad health when he signed the good health certificate. Witnesses for the estate testified that Prudential's soliciting agent had made assurances that the life insurance policy would still be valid even though decedent was sick when applying for the policy. In rejecting the estate's claim that Prudential's soliciting

agent had waived the good health prerequisite, the Alabama Supreme Court held that the insured cannot be deemed ignorant of the terms of his own policy, and "[n]o conclusion can be indulged that the agent, under such circumstances had, or could have acted on, any real or supposed authority, for waiving any conditions specified as grounds of forfeiture." To do otherwise, the Court held "would be against the plainest dictates of reason and justice." [12]

Although the Court refused to acknowledge it, its ruling herein is contrary to *Powell* and its progeny. Admittedly, the Alabama Supreme Court has, on very few occasions, applied a limited exception to the rule that soliciting agents do not have the authority to bind insurers in contract. However, this limited exception had, before the Court's ruling *sub judice*, selectively been ex-

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[12] *See also, North Carolina Mutual Life Ins. Co. v. Kerley*, 109 So. 755, 215 Ala. 100 (1926); *Globe & Rutgers Fire Ins. Co. v. Pappas*, 219 Ala. 332, 122 So. 346; *Banker's Credit Life Ins. Co. v. Ayers*, 223 Ala. 407, 137 So. 23; *Life Ins. Co. of Virginia v. Newell*, 223 Ala. 401, 137 So. 16; *City Mortgage and Discount Co. v. Palatine Ins. Co.*, 226 Ala. 179, 145 So. 490; *Tutton v. Liverpool and London and Globe Ins. Co.*, 237 Ala. 230, 186 So. 551; *First National Life Insurance Co. of America v. Rector*, 225 Ala. 116, 142 So. 392 (1932); *Jones v. Liberty National Life Ins. Co.*, 35 Ala. App. 52, 47 So.2d 222, *aff'd* 254 Ala. 111, 47 So.2d 227; *Jefferson Life & Casualty Co. v. Williams*, 37 Ala. App. 718, 76 So.2d 185 (1954); *Security Life and Trust Co. v. Galin*, 280 Ala. 325,193 So.2d 766 (1967) ("An agent whose authority is limited to soliciting insurance, delivering policies and collecting premiums has no power to change stipulations in a contract of insurance, to do so he must either be a general agent or be specifically authorized or his course of dealing to that extent have been ratified expressly or impliedly. *United Ins. Co. v. Headrick*, 275 Ala. 594, 157 So.2d 19; *Liberty National Life Insurance Co. v. Staggs*, 242 Ala. 363, 6 So.2d 432"); *Herricks v. Mutual Life Ins. Co. of New York*, 294 Ala. 446, 318 So.2d 683 (1975); *Watson v. Prudential Ins. Co.*, 399 So.2d 285 (Ala. 1981); *Washington National Ins. Co. v. Strickland*, 491 So.2d 872 (1985); *Land & Associates, Inc. v. Simmons*, 562 So.2d 140 (Ala. 1989) (*cert. denied*, —— U.S. ——, 111 S. Ct. 1305, 113 L. Ed. 2d 240 (1991)); *Todd v. Woodmen*, 620 So.2d 591 (Ala. 1993).

tended only when the undisputed evidence indicated that the insurance applicant was both innocent and ignorant of the fraud perpetrated upon the insurer.[13]

For example, in *National Life & Accident Ins. Co. v. Allen,* 285 Ala. 551, 234 So.2d 567 (1970), cited by the Court as authority for its ruling, the applicant was a highly unsophisticated blind man who, without dispute, did not participate in, and, because of his physical and intellectual incapacities, was incapable of participating in the fraud perpetrated upon the insurer.

By contrast, in the case *sub judice* even the Alabama Supreme Court, in fulfilling its obligation to review the record in a light most favorable to respondent, acknowledged, "the jury could find that the only misrepresentation made by Mr. Miller came when he signed a good health certificate." App. A, 7a. Heretofore, such a show-

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[13] *See e.g.: First National Life Insurance Co. v. Rector,* 225 Ala. 116, 142 So. 392 (1932) (Applicant did not know and could not have known that soliciting agent fraudulently failed to write down applicant's disclosure regarding previous medical treatment); *American Life Insurance v. Buntyn,* 148 So. 617 (Ala. 1933) (Soliciting agent, while filing out application, unbeknownst to the applicant, did not record applicant's truthful response to insurer's application questions); *Interocean Casualty Co. v. Irvin,* 229 Ala. 312, 156 So. 844 (1934) (Soliciting agent filled out an application for accident and health insurance on behalf of deaf and dumb applicant who could neither read nor write and fraudulently misrepresented that neither the applicant's hearing nor vision was impaired); *Commercial Casualty Insurance v. Hudgens,* 160 So. 106 (Ala. 1935) (Soliciting agent, while filling out the application, unbeknownst to the applicant, did not record applicant's truthful responses to insurer's application questions); *Coastal States Life Insurance Co. v. Leonard,* 279 Ala. 171, 182 So.2d 913 (1966) (Soliciting agent filled out application for accidental death benefits by recording applicant's oral responses to the application questions, however, instead of asking applicant all the questions contained in the application, agent fraudulently inserted his own answers to the questions). See also *Williamson v. New Orleans Ins.,* 84 Ala. 106 (1887); *United Security Life Insurance Co. v. St. Claire,* 130 So.2d 213 (Ala. 1961); *Alabama Farm Bureau Mutual Ins. v. Davis,* 354 So.2d 15 (Ala. Civ. App. 1978).

ing of conscious misrepresentation would preclude the existence of a genuine issue of material fact on a breach of contract claim, because, as more specifically set forth below, § 27-14-7 *Code of Alabama* (1975) prohibits an applicant from recovering on an insurance policy if he misrepresents his health when applying for insurance, or, if the insurer, in good faith would not have issued the policy had it known the "true facts" concerning the applicant's health.

By its extensive recitation of established Alabama law, Petitioner is not requesting this Court to reweigh the merits of the Alabama Supreme Court's policy determinations or to otherwise conduct a wholesale review of the Alabama Supreme Court's opinions, nor is Petitioner suggesting that the Alabama Supreme Court does not have the authority to depart from, or even overrule established Alabama law in an attempt (even if misguided) to protect the rights of Alabama citizens. However, Petitioner vigorously contends that the Due Process Clause of the Fourteenth Amendment prohibits the Alabama Supreme Court from, as it did in this case, implicitly overruling existing law, and, based upon such an unanticipated departure from established law, forcing an insurer to submit to a trial on a claim requesting punitive damages merely because the insurer lacked the "foresight" to anticipate the Alabama Supreme Court's capacity to completely disregard *stare decisis*.

II. THE ALABAMA SUPREME COURT, IN REVERSING SUMMARY JUDGMENT ON RESPONDENT'S BREACH OF CONTRACT CLAIM, IMPROPERLY MANIPULATED ALABAMA LAW SO AS TO AVOID APPLYING § 27-14-7 *CODE OF ALABAMA* (1975).

When addressing Petitioner's request that the Court adhere to § 27-14-7 *Code of Alabama* (1975) which prohibits recovery under an insurance policy if the applicant, in applying for insurance, made representations that were either fraudulent, material to the acceptance of the risk, or if the insurer would not have issued the policy if the

"true facts" regarding the applicant's health had been known,[14] the Court acknowledged the statute's existence, but refused to enforce it because, it held that a jury could find decedent, in telling Treadwell's employee he had emphysema, sufficiently informed Petitioner that he was in fact in bad health so as to render the written statement of good health provided Petitioner a nullity. Such a ruling, although not expressly stated, renders all disclosures to a soliciting agent to be disclosures to the principal, and, as such, abolishes the traditional distinction between general and soliciting agents.[15] Moreover, the Court's ruling deprives insurers of their right to limit the authority of their agents to bind them in contract.[16]

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[14] § 27-14-7 *Code of Alabama* (1975) states:

> (a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk of to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.
>
> (b) No plea of misrepresentation or fraud in connection with the issuance of a life insurance policy or annuity contract shall be filed unless accompanied by a payment into court of all premiums paid on the policy or contract.

[15] See argument *supra*.

[16] The Alabama Supreme Court, for over a century has recognized an insurer's fundamental right to limit the authority of its agents to bind them in contract. *See for example Robinson v. Aetna Ins.*

III. THE ALABAMA SUPREME COURT IMPROPERLY APPLIED ITS NEWLY FASHIONED EXCEPTION TO § 27-14-7 *CODE OF ALABAMA* (1975) RETROACTIVELY.

So as to avoid its effect, the Alabama Supreme Court judicially limited § 27-14-7 *Code of Alabama* (1975), this in turn exposed Petitioner to punitive damages for actions which, at the time performed, were in accordance with the law—such retroactive applications of newly fashioned law deprives Petitioner of its right to due process. This Court has held that the *Ex Post Facto* Clause limits the powers of the Legislature and does not of its own force apply to the judicial branch. *See Frank v. Mangum,* 237 U.S. 309 (1915). However, the "fair warning" principle contained in the *Ex Post Facto* Clause is "fundamental to our concept of constitutional liberty," and is a component of Due Process. *Marks v. United States,* 430 U.S. 188, 191-92 (1977). *See also Kolender v. Lawson,* 461 U.S. 352, 358 (1983). There is a constitutional right to notice of any conduct that will give rise to punishment, a right protected against judicial infringement by the Due Process Clause of the Fifth Amendment. *Marks v. United States,* 430 U.S. at 192. In *Marks,* the Court observed that a retroactive judicial enlargement of a criminal statute operates as *ex post facto* of law. *Id.* Since a state legislature is barred by the *Ex Post Facto* Clause from passing retroactive laws, the Court stated, "it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id. See also, Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964). *Marks* involved the judicial enlargement of a *quasi* criminal federal statute prohibiting transportation of obscene materials. Its rationale should apply equally to the retroactive enlargement of an established common

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Co., 128 Ala. 477, 30 So. 665 (1901); *Southern State Fire Ins. Co. v. Kronenberg*, 199 Ala. 164, 170-71, 7463, 67 (1917); *Washington Nat'l Ins. Co. v. Strickland*, 491 So.2d 872 (1985).

law remedy to the extent that it emasculates a clear and unambiguous statutory provision and provides for the assessment of punitive damages thereunder. This Court, in *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1490 (1994) recognized that "[t]he very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question." And, as will be demonstrated herein below, the impetus for the Court's refusal to enforce § 27-14-7 *Code of Alabama* (1975) was based not upon established principals of law as the Alabama Supreme Court attempted to conjure, but instead was based upon the Court's unwillingness to abide by the constitutional limits placed upon it to uphold, rather than circumvent, legislative enactments.

Again, Petitioner is not requesting this Court to intervene in this case and conduct a wholesale review of the Alabama Supreme Court's decisions. However, Petitioner respectfully submits that in circumstances such as the case *sub judice*, where the Alabama Supreme Court overrules established law (thereby creating a cause of action where none previously existed), retroactively imputes to the defendant knowledge of the Court's unanticipated departure from established law, and refuses to enforce a duly enacted statute based upon the Court's capricious broadening of a common law exception (a broadening so comprehensive that the "exception" now supersedes the rule), Petitioner's right to due process mandates a review of the Alabama Supreme Court's ruling.

IV. THE ALABAMA SUPREME COURT'S TRUE MOTIVE IN REVERSING SUMMARY JUDGMENT ON RESPONDENT'S BREACH OF CONTRACT AND BAD FAITH CLAIMS WAS TO CIRCUMVENT THE ALABAMA LEGISLATURE'S AUTHORITY TO GOVERN THE INSURANCE INDUSTRY, AND, BECAUSE OF ITS DISAPPROVAL OF THE LAW CURRENTLY IN FORCE AND EFFECT, TO ADOPT ITS OWN LAW REGARDING PROPER PRE-POLICY ISSUANCE PROCEDURES.

The arbitrariness of the Alabama Supreme Court's ruling herein is reflected in *Huff v. United Ins. Co.*, Ala. S. Ct. No. 193 1516 (May 1995), rendered just three months after the ruling *sub judice*. App. F, 127a. In *Huff*, decedent applied for life insurance for himself and his wife. Huff failed to acknowledge any health problems on the completed application. However, Mr. Huff had been treated for heart problems; Mrs. Huff had suffered from diabetes and its accompanying complications.

Shortly after United issued the policy, Mr. Huff died of a heart attack, and Mrs. Huff submitted a claim thereon. Upon investigation, United discovered that Huff had misrepresented his health, and because of the misrepresentation, refused to pay the death benefit. Mrs. Huff filed an action against United for breach of contract, bad faith, and fraud.

In affirming Summary Judgment in favor of United, the Alabama Supreme Court held:

> "[t]his fact situation illustrates an all-too-common situation for Alabamians in life insurance transactions. United issued the policy without investigating the applicants' health. *As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. . . . When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement*

> *could prevent situations like the one in this case.*" (Emphasis added). App. F, 131a.

Despite its disapproval of Alabama's legislative approved pre-policy issuance procedure, the Court, in a rare showing of judicial restraint, affirmed Summary Judgment in favor of United, holding:

> "Undoubtedly, it *would be in the interests of the insurer, the applicant, and judicial economy for the insurer to investigate the applicant's health history before issuing a policy.* Apparently, though, *until that is required, the sale of this type of life insurance policy* with no serious attempt to determine the applicant's true health history *will continue, to the frustration of 'beneficiaries' of the deceased.*" (Emphasis added). App. F, 131a-132a.

The Court failed to explain how it would be more economical for an insurer, particularly one providing inexpensive short-term credit life insurance, to, before issuing a policy, conduct a detailed investigation of the applicant's health history, the cost of which would inevitably be passed on to the applicant, rather than rely on the applicant to tell the truth when responding to application questions regarding his/her health. Incredibly, the *Huff* Court blames insurers when insurance applicants misrepresent the status of their health and recommends imposing requirements upon insurers to conduct an additional investigation to determine whether the applicant in fact told the truth. This, the Alabama Supreme Court deems fair. Irrespective of the soundness of its logic, the Alabama Supreme Court's dicta in *Huff* reveals its real motivation for reversing Summary Judgment herein—the Court simply does not approve of Alabama's legislatively adopted and approved pre-policy issuance procedures for insurers. Instead, the Court would like to impose upon every insurer, even those who offer short-term credit insurance, a duty to conduct an investigation regarding the applicant's health. However, as the Court in *Huff* begrudgingly admitted, but the Court in *Miller* conveniently sidestepped, in the absence of clearly defined constitutional

mandates to the contrary, modification of statutory law falls within the purview of the Alabama legislature, not the Alabama Supreme Court. The Court's ruling in this case is judicial activism at its worst. To reach a decision it deemed fair, the Alabama Supreme Court usurped the Alabama legislature's authority to legislate, and, as a result thereof, deprived Petitioner of its right to due process.

V. THE ALABAMA SUPREME COURT IMPROPERLY REVERSED SUMARY JUDGMENT ON RESPONDENT'S BAD FAITH CLAIM BASED ONLY ON ITS CONCLUSION THAT RESPONDENT HAD PRESENTED A *PRIMA FACIE* CASE TO SUPPORT ITS BREACH OF CONTRACT CLAIM, WITHOUT EVEN ACKNOWLEDGING THE MORE ONEROUS BURDEN NECESSARY TO PROCEED WITH A BAD FAITH CLAIM.

In reversing Summary Judgment on respondent's bad faith claim, the Alabama Supreme Court recited no evidence regarding Petitioner's bad faith in refusing to pay on decedent's policy. This was no mere oversight—respondent presented to the Court no evidence of Petitioner's bad faith in handling her claim. To begin with, respondent has never filed a claim on decedent's policy; nor has respondent explained how Petitioner can be liable to her for bad faith on a claim she never filed. More importantly, respondent bases her bad faith claim on the pre-policy purported misrepresentation by the Treadwell employee regarding Mr. Miller's eligibility for credit life insurance. Incredibly, the Alabama Supreme Court followed respondent's argument, even though the tort of bad faith, by definition, arises only after the insured proves the existence of an insurance contract between the parties and a breach thereof by the insurer.[17] In what is sure to be recognized as a landmark decision, the Alabama Supreme Court has deemed allegations of pre-policy statements by an insurer's soliciting agent to be *prima facie* evidence of a tort that, by definition, is limited to an insurer's post-contract, indeed post-claim, activities.

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[17] *Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So.2d 1 (Ala. 1981).

It is noteworthy that, *National Life and Accident Ins. Co. v. Allen*, 285 Ala. 551, 234 So.2d 567 (1970), upon which the Court relied in reversing Summary Judgment on respondent's breach of contract and bad faith claims, was decided before the Alabama Supreme Court recognized the tort of bad faith. Accordingly, the *Allen* Court did not have an opportunity to address the distinction between evidence sufficient to proceed with a breach of contract claim and evidence sufficient to meet the more onerous burden necessary in order to proceed with a bad faith claim. However, the Alabama Supreme Court has, on numerous occasions since *Allen*, distinguished between the two burdens, and consistently held plaintiffs to a very strict standard of presenting a *prima facie* case of bad faith.

The Alabama Supreme Court first recognized a cause of action for bad faith failure to pay an insurance claim in *Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So.2d 1 (Ala. 1981).

Although the Court has greatly vacillated in its definition of what constitutes a *prima facie* case of bad faith,[18] it remains undisputed that the necessary elements of bad faith are:

> "(a) an insurance contract between the parties and a breach thereof by the Defendants;
>
> (b) an intentional refusal to pay the insured's claim;
>
> (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> (e) if the intentional failure to determine the existence of a lawful basis is relied upon, the Plaintiff must prove the insurer's intentional failure to

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[18] *See Auto-Owners Insurance Co. v. Ogden*, Ala. S.Ct. 1930368, 1995 Ala. LEXIS 70, —— So.2d —— (1995) (Maddox, J. dissenting).

determine whether there is a legitimate or arguable reason to refuse to pay the claim." [19]

Shortly after recognizing the tort of bad faith, the Alabama Supreme Court went out of its way to assure insurers that they would not be inundated with bad faith claims: "Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose in means of breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will. . . . We are satisfied that the application of the test formulated above, which recognizes the intentional nature of the tort of bad faith and puts the test upon an objective basis, will minimize the fears expressed by the Defendant insurance company that to permit claims for bad faith would result in extortionate lawsuits. Such result cannot follow when an insurance company in the exercise of ordinary care makes an investigation of the facts and law and concludes on a reasonable basis that the claim is at least debatable." *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916 (Ala. 1981) adopting *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 693, 271 N.W.2d 368, 377 (1978).

"In the normal case in order for a Plaintiff to make out a *prima facie* case of bad faith refusal to pay an insurance claim, the proof offered must show that the Plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." *National Savings Life Ins. Co. v. Dutton*, 419 So.2d 1357, 1362 (Ala. 1982).

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[19] *Gillion v. Alabama Forestry Ass'n.*, 597 So.2d 1315, 1321 (Ala. 1992) *citing Independent Life & Accident Insurance Co. v. Parker*, 449 So.2d 233 (Ala. 1984). The Gillion Court further states: "If any one of the reasons for denial of coverage is at least 'arguable,' this Court need not look any further." *Gillion* citing *McLaughlin v. Alabama Farm Bureau Mut. Cas. Insurance Co.*, 437 So.2d 86, 91 (Ala. 1983).

The Alabama Supreme Court, in circumstances where it would be impossible for a plaintiff to prevail on a motion for directed verdict on the contract claim, has relaxed the plaintiff's preliminary evidentiary burden necessary for proceeding with a jury trial on his bad faith claim.[20] However, in these limited circumstances, the Court waived the "directed verdict on the contract claim" burden because the normally independent issue of an insurer's liability to pay a particular claim on a policy (the existence of which is undisputed) and whether the insurer properly processed the insured's claim were inseparably linked.[21] This is not such a case. In this case, Petitioner does not dispute its liability on a particular claim; instead, Petitioner, based on established law maintains that Mr. Miller's misrepresentation precludes the existence of a contract. As demonstrated *supra*, the Alabama Supreme Court, in reversing Summary Judgment on respondent's breach of contract claim, created a new basis upon which insurers may be bound in contract, and, based on this newly fashioned law, returned respondent's bad faith claim to the trial court. In so doing, the Alabama Supreme Court has rendered Petitioner's compliance with

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[20] See, for example, *Continental Assurance Co. v. Kountz*, 461 So.2d 802 (Ala. 1984); *AETNA Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987); *Blue Cross/Blue Shield of Alabama v. Granger*, 461 So.2d 1320 (Ala. 1984).

[21] See, for example, *Jones v. Alabama Farm Bureau Mutual Cas. Co.*, 507 So.2d 396 (Ala. 1987) (Plaintiffs had a home owner's policy insuring against damage caused directly by lightning but not against indirect damage such as from a tree falling on the power line. After a severe storm, plaintiffs filed a claim for damaged personal property. Farm Bureau's adjuster denied plaintiffs' claim, because he testified, plaintiff told him the damage was caused when a tree limb fell on their power line, causing a power surge. Plaintiffs denied this statement, insisting they had informed the adjuster the damage was caused by lightning. Because Farm Bureau's sole basis for denying plaintiffs' claim was their alleged statements as to the cause of the damage, and because it was undisputed that Farm Bureau would be liable for damage caused by lightning, the Alabama Supreme Court waived the "directed verdict on the contract claim" burden.

the laws in force and effect at the time it notified respondent of Mr. Miller's ineligibility for insurance to be grounds for a claim alleging intentional misconduct. By holding allegations of pre-policy misconduct to be sufficient to proceed on a claim that is limited in scope to post-policy conduct, and by further failing to recognize the important distinction between *prima facie* evidence of breach of contract and *prima facie* evidence of bad faith, the Alabama Supreme Court deprived Petitioner of its right to due process.

VI. EVEN THOUGH PETITIONER MAY ULTIMATELY PREVAIL ON RESPONDENT'S BAD FAITH CLAIM, REQUIRING A JURY TRIAL THEREON WILL DEPRIVE PETITIONER OF ITS RIGHT TO DUE PROCESS.

In light of this Court's already overladened docket, the easiest response to Petitioner's request for a Writ of Certiorari would be for this Court to acknowledge the very serious ramifications of the Alabama Supreme Court's ruling herein, but to suspend judgment thereon until a jury has had an opportunity to hear all of the evidence and render a verdict in Petitioner's favor. However, such an approach is constitutionally unacceptable—forcing Petitioner to submit to a jury trial on respondent's bad faith claim would deprive Petitioner of its right to due process. Despite the Alabama Supreme Court's assurances in *Barnes*, bad faith claims have nearly strangled Alabama insurers.[22] In the most recent calendar year, punitive damage verdicts in Alabama totaled more than $200,000,000. In the four years since this Court's last review of the Alabama punitive damage system (*Haslip*), Alabama juries

[22] The Alabama Insurance Commissioners Office indicates that the following insurance companies have expressly refused to sell policies in Alabama as a result of crippling punitive damage awards: Aegon; Blue Ridge Insurance Company; Columbian Mutual Life Insurance Company; Fortis Benefits; John Alden Life; Life Insurance Company of Georgia; Minnesota Mutual Life Insurance Company; Northland Insurance Company; Pyramid Life Insurance Company; Southern General Insurance Company; Time Insurance Company; Vanguard Insurance Company; and Provident Indemnity Insurance Company.

have returned punitive damage verdicts in excess of $700,000,000.[23] These increasingly frequent, yet staggering punitive damage awards have captivated the nation's attention. Professor George L. Priest of Yale Law School observes that Alabama's recent flurry of punitive damages "is unparalleled in the history of American jurisprudence." Testimony of George L. Priest, *Johnson v. Life of Georgia*, No. CV-93-969 (Cir. Ct. of Mobile Co., AL, Sept. 16, 1994). National publications have noted that, although Alabama is one of the nation's least populated states (approximately 400,000,000 residents) and has one of the poorest economies, the punitive damages awarded by juries and upheld by the Alabama Supreme Court greatly exceed those of nearly every other state in the union. *See L. Himelstein, Jackpots from Alabama Juries, Business Week*, Nov. 28, 1994, at 83; *Bueno, as Alabama Juries Punish Business, Business Seeks to Punish the Judge, Wall St. J.*, Nov. 2, 1994, at S1. The infectious increase of punitive damage awards in Alabama prompted one national publication to describe Alabama as 'tort hell'. *See G. Jaynes, Where the Tort Blossom, Time*, Mar. 20, 1995, p. 38; *D. Frum, Unreform, Forbs*, Feb. 1, 1993 at 82.[24]

Researchers for the Rand Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damage] award" and that "[p]unitive [damage] awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." *M. Peterson, S. Sarma & M. Chanley Punitive Damages*: empirical findings iii, 50 (1987). "[J]uries also award more money when the defendants are institutions or organizations rather than

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[23] See App. E, for an exhaustive survey of punitive damages in Alabama for the preceding ten years, including verdicts from both state and federal courts sitting in diversity.

[24] As set forth in *Amicus* Brief of the Business Counsel of Alabama in support of Petitioner in *BMW of North America, Inc. v. Gore*, No. 94-896, Oct. term, 1994.

individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effort for deep-pocket defendants, even in cases that do not involve products or malpractice." *D. Helnsler, M. Vaiana, J. Kakalik, M. Peterson, Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987). *See also, Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 944 (1989).

This Court has recently expressed concern that large corporations face special risks in punitive damages cases. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 (1993), (plurality opinion), this Court observed that large punitive damage awards "may have been influenced by prejudice against large corporations, a risk that is a special concern when the Defendant is a non-resident."

The Alabama Supreme Court has done nothing to dispel this Court's concern. On the contrary, the Alabama Supreme Court seems more inclined to foster, rather than prevent, a jury's abuse of an out of state corporate defendant. Furthermore, the Alabama Supreme Court does not even require there be a relationship between jury awarded compensatory and punitive damages.[25] For example, in *Liberty National Life Ins. Co. v. McAllister*, No. 1931163 Slip. Op. (Ala. F. 2495), the Alabama Supreme Court recently affirmed a jury's $1,000,000 punitive damages verdict against an out of state corporate defendant even though the Plaintiff suffered no actual loss.

In an atmosphere of such hostility against out of state corporate defendant, it is a veritable certainty that any claim requesting punitive damages against an out-of-state

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[25] "[i]mposing . . . a relationship [between compensatory and punitive damages] would inevitably result in injustice and we decline to impose it." *Southern Life & Health Ins. Co. v. Turner*, 586 So.2d 854, 858 (Ala. 1991); *General Motors Co. v. Johnston*, 592 So.2d 1054 (Ala. 1992); *Independent Life & Acc. Ins. Co. v. Harrington*, 1994 W. L. 407246 (Ala. 1994).

insurer, if presented to an Alabama jury, will result in an adverse verdict, irrespective of the validity of the claim upon which the request for punitive damages is premised. And, requiring Petitioner to undergo such an ordeal at the whim of the Alabama Supreme Court, would deny Petitioner its rights to due process.

CONCLUSION

The Alabama Supreme Court's decision to reverse Summary Judgment on respondent's breach of contract and bad faith claims was not grounded in established law as the Court represents; instead, the Court's ruling was founded in its growing desire to legislate, and its innate prejudice against out-of-state corporate defendants—both inappropriate grounds for ruling, but both representative of a growing number of Alabama Supreme Court decisions. If left unchecked by this Court, the Alabama Supreme Court will continue to render arbitrary decisions against out-of-state defendants and will eventually "legislate" foreign corporations right out of Alabama.

This case presents to the Court a rare opportunity to correct an unconstitutional decision before the defendant suffers an irremediable harm. This, coupled with the opportunity to review Alabama's post—*Haslip* progress in balancing the competing interests of a plaintiff's desire to recover punitive damages and a defendant's right to due process, should appeal to this Court's heightened sense of fair play and substantial justice. Accordingly, Petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Released Feb. 24, 1995]

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1994-95

1921552

JOYCE MILLER, individually and as administratrix of the estate of MEARL M. MILLER, deceased; and PAULA GOSS, individually

v.

DOBBS MOBILE BAY, INC., *et al.*

Appeal from Mobile Circuit Court
(CV-92-1638)

INGRAM, JUSTICE.

This case arises out of a refusal to pay benefits under a credit life insurance policy. Specifically, after Mearl Miller's death, Ford Life Insurance Company ("Ford Life") denied payment on his credit life policy because it contended that a health certificate executed by Mr. Miller was false and that he had been in bad health when he purchased the insurance. After Ford Life refused to pay any benefits under the policy, Joyce Miller, as ad-

ministratrix of the estate of Mearl Miller,[1] and Paula Goss, individually, sued Ford Life and Dobbs Mobile Bay, Inc., d/b/a Treadwell Ford, an automobile dealership ("Treadwell"). The trial court entered summary judgments in favor of Ford Life and Treadwell, and Miller and Goss appealed.

On a motion for summary judgment, the burden is initially on the movant to make a prima facie showing that there is no genuine issue of material fact (i.e., that there is no dispute as to any material fact), and that he is entitled to a judgment as a matter of law. Rule 56, Ala.R.Civ.P.; *McClendon v. Mountain Top Flea Market, Inc.*, 601 So.2d 957 (Ala. 1992); *Elgin v. Alfa Corp.*, 598 So.2d 807 (Ala. 1992). "The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing that there is no such issue of material fact." *McClendon*, at 958; *Elgin*, at 810-11.

Rule 56 must be read in conjunction with the "substantial evidence rule," § 12-21-12, Ala. Code 1975, for actions filed after June 11, 1987. *See Bass v. SouthTrust Bank of Baldwin County*, 538 So.2d 794, 797-98 (Ala. 1989). In order to defeat a defendant's properly supported motion for summary judgment, the plaintiff must present substantial evidence, i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala. 1989). This Court reviews the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. *Wilma Corp. v. Fleming Foods of Alabama, Inc.*, 613 So.2d 359 (Ala. 1993). Viewed that way, the evidence before the court

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[1] The first complaint named Joyce Miller only as administratrix of the estate of Mearl Miller. In that first complaint, she did not sue individually.

on the summary judgment motion suggested the following facts.

On February 28, 1989, Mr. Miller purchased a 1985 Ford LTD Crown Victoria automobile from Treadwell. His daughter, Paula Goss, and Paula's husband accompanied him to the Treadwell dealership and were present during all conversations concerning the negotiations and financing of the car. On all documents executed in connection with the sale of the car, Mr. Miller identified himself as the sole purchaser of the automobile.

During the negotiations concerning the sale of the car, a Treadwell salesman asked Mr. Miller whether he wanted to purchase credit life insurance coverage. Mr. Miller replied that he did not want the coverage and he informed the salesman that he was sick. Mr. Miller was then sent to the Treadwell office to complete the necessary paperwork on the purchase of the car. While in the office, Mr. Miller talked with another Treadwell employee, who represented Ford Life; that employee asked him again about the credit life insurance coverage. Mr. Miller, noting that the form stated that the coverage was optional, answered that he did not want the coverage, and told that employee that he was sick. At that time, the Treadwell employee/Ford Life representative stated that if Mr. Miller did not buy the credit life coverage, he could not by the car. Mr. Miller responded by stating that he had health problems; however, the Treadwell employee/Ford Life representative indicated that Mr. Miller's health would not be a problem and that the insurance would be effective notwithstanding the state of his health. At that time, Mr. Miller signed the necessary paperwork for the credit life insurance coverage, including a health certificate stating that he was in good health. Approximately four months after purchasing the car, Mr. Miller was diagnosed with lung cancer, and he died approximately eight months later.

Central Bank of the South had financed the purchase of the car and was the primary beneficiary of Mr. Miller's

credit life insurance policy. His estate was listed as the secondary beneficiary. Neither Joyce Miller (Mearl Miller's wife) nor Paula Goss was listed as a beneficiary of the policy. Upon Mr. Miller's death, Central Bank filed a claim with Ford Life under the credit life policy. Ford Life denied the claim, contending that Mr. Miller had not been in good health when he bought the policy. Central Bank then repossessed the vehicle because payments were not being made, sold it, and sued Mr. Miller's estate for the deficiency balance.

Mrs. Joyce Miller, as administratrix, and Mrs. Goss, individually, then filed this present action against Treadwell and Ford Life, alleging fraudulent representations and breach of contract. They also alleged bad-faith-refusal-to-pay on the part of Ford Life. Almost one year later, the plaintiffs attempted to amend the complaint in this present action to add numerous new claims. It also appears that, by including her name in the caption of the proposed second amendment, Joyce Miller was attempting to join, individually, as a plaintiff. This amendment was denied. The trial court entered a summary judgment in favor of each defendant, and this appeal followed.

The threshold question concerns the proper parties to this appeal. The notice of appeal names Joyce Miller, both as administratrix of her husband's estate and individually, and names Goss, individually. However, as the trial court correctly held, "[n]either Joyce Miller nor Paula Goss suffered any legal detriment in connection with the purchase of the vehicle or credit life insurance, as they were not co-buyers of the vehicle or of the credit life insurance." Therefore, the only plaintiff properly in this action is Mrs. Miller, who is in it properly as administratrix of the estate of her deceased husband. We now proceed to discuss the administratrix's contentions that the trial court erred in entering the summary judgments for Ford Life and Treadwell on all counts.

Fraud

(Treadwell and Ford Life)

The trial court held that the fraud claims did not survive the death of Mr. Miller. We agree. Any claim based on a fraud perpetrated on Mr. Miller would not survive in favor of his personal representative. Ala. Code 1975, § 6-5-462. *Dennis v. Magic City Dodge, Inc.*, 524 So.2d 616 (Ala. 1988); *Davis v. Southern United Life Ins. Co.*, 494 So.2d 48 (Ala. 1986). Therefore, the trial court properly entered the summary judgments as to the fraud claims.

Breach of Contract

(Treadwell)

The trial court held that the credit life insurance contract was issued by Ford Life and that Treadwell was acting only as Ford Life's agent. Therefore, it held that Treadwell would not be liable for Ford Life's alleged breach of contract, i.e., its failure to pay on the policy. We agree. An agent cannot be held liable for his principal's breach of contract. *Smith v. Equifax Services Inc.*, 537 So. 2d 463 (Ala. 1988). Therefore, the trial court properly entered the summary judgment for Treadwell on the breach of contract claim.

Breach of Contract

(Ford Life)

The trial court held that the credit life insurance contract was unenforceable because, it held, Mr. Miller had made fraudulent statements concerning his health; it held that Mr. Miller's signing of the good health statement barred a recovery, citing Ala. Code 1975, § 27-14-7. That provision states that misrepresentations of fact can prevent recovery under an insurance policy if they are fraudulent, if they are material to the acceptance of the risk, or if the insurer would not have issued the policy

or would not have issued it in the manner in which it was issued if the "true facts" had been known. The court further held that even if the Treadwell employee/ Ford Life representative had made any misrepresentations to Mr. Miller, that employee did not have the authority to do so. In other words, the trial court concluded that Ford Life's representative (Robert Wayne Sparks), working on Treadwell's premises, was only a "soliciting agent" for Ford Life and, as such, had no authority to alter the written contract, which required that the applicant be in good health when it was entered in order to receive the benefits of the policy.

The trial court held that Mr. Miller had misrepresented his health condition to Ford Life and, therefore, that his estate could not recover. Although we are aware that Mr. Miller signed a certificate stating that he was in good health, even though he was not in good health, the facts alleged in this case take it out of the ordinary situation. Here, the evidence, viewed most favorably to Mrs. Miller, indicates that Mr. Miller never contended that he was in good health. In fact, he old the Treadwell salesman and the Ford Life representative that he did not want the credit life coverage, because he was sick. Mrs. Miller presented evidence that Mr. Miller purchased the insurance only after the Ford Life representative had insisted that his poor health would not be a problem.

It is well settled that an insurance company cannot defend its refusal to pay benefits on grounds that the insured made a misrepresentation in the application if the misrepresentation was the fault of the agent and that fault was without participation by the insured. *National Life & Acc. Ins. Co. v. Ailen,* 285 Ala. 551, 234 So.2d 567 (1970). Moreover, Ala. Code 1975, § 27-14-7, does not apply where there has been no concealment by the insured. *Duren v. Northwest Nat'l Life Ins. Co.,* 581 So.2d 810 (Ala. 1991).

Viewing the record most favorably to Mrs. Miller, we find no misrepresentations or fraudulent statements made by Mr. Miller to the Ford Life representative. A jury could find that he told everyone he was sick and that he did not want the credit life insurance coverage and that he did not conceal his poor health from anyone. The jury could find that the only misrepresentation made by Mr. Miller came when he signed a good health certificate. However, the jury could find that that misrepresentation was made at the insistence of the Ford Life representative.

Clearly, on the breach of contract claim Mrs. Miller met her burden of establishing a genuine issue of material fact, and the trial court erred in entering a summary judgment in favor of Ford Life as to that claim.

We disagree with the trial court's conclusion that the Ford Life representative, as a soliciting agent, could not legally bind the company. The evidence, viewed in a light most favorable to Mrs. Miller, indicates that the Ford Life representative knew that Mr. Miller had health problems, but issued the policy anyway. In fact, it indicates that he stated that if Mr. Miller did not buy the credit life policy, he could not buy the car. Under these specific facts, we hold that Ford Life cannot defend its refusal to pay on the basis that its agent did not have the authority to bind it.

As stated by the Arkansas Supreme Court in a case factually similar to this one:

> "Obviously the agent is encouraged to sell insurance, which is Ford Life's business, and paid a handsome commission. Everyone is satisfied until the death of the insured when it may be learned that he was not 'in good health.'
>
> "Such a situation puts an unrealistic burden on an insured which can only result in a decided advantage enuring to the benefit of the company."

Ford Life Ins. Co. v. Jones, 262 Ark. 881, 886, 563 S.W.2d 399, 402 (1978).

The Mississippi Supreme Court also was faced with a similar situation in *Southern United Life Ins. Co. v. Caves,* 481 So.2d 764, 768 (Miss. 1985). In *Caves,* the agent knew that the applicant for credit life insurance coverage had suffered heart problems in the recent past. However, even though there was a "good health" clause in the application, the agent altered the terms and approved credit life insurance on the applicant. The Mississippi Supreme Court held that the agent's knowledge of the applicant's preexisting heart condition was imputed to the insurer. Therefore, because the agent's actions were binding on the principal, the policy conditions of insurability were effectively waived. *Caves.* The Mississippi court said:

> "Where an insurance company makes no effort to establish clear and meaningful guidelines to assist its agents in discerning persons eligible for coverage, but merely relies on the agents' judgment to select those persons appearing to be healthy, that company by its actions manifests an intention to 'insure the world.' "

481 So. 2d at 768.

Therefore, the summary judgment in favor of Ford Life is reversed as to Mrs. Miller's breach of contract claim.

Bad Faith

(Ford Life)

Because the trial court held for Ford Life on the breach of contract claim, it also entered a summary judgment in favor of Ford Life on Mrs. Miller's bad faith claim. Because we reverse as to the breach of contract claim, we also reverse the summary judgment as to the bad faith claim.

The judgments are affirmed in part and reversed in part, and the cause is remanded.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Shores, Kennedy, and Butts, JJ., concur.

Almon, J., concurs in the result.

Maddox, J., concurs in part and dissents in part.

MADDOX, JUSTICE (concurring in part; dissenting in part).

I would affirm the judgment of the trial court; therefore, I concur in part and dissent in part.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

May 12, 1995

1921552

JOYCE MILLER, individually and as administratrix of the estate of MEARL M. MILLER, deceased, *et al.*

v.

DOBBS MOBILE BAY, INC., *et al.*

(Mobile: CV-92-1638)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

INGRAM, J.—Almon, Shores, Kennedy and Butts, JJ., concur; Maddox, J., dissents.

APPENDIX C

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No. CV-92-1638

JOYCE MILLER, administratrix for the ESTATE of MEARL M. MILLER; and PAULA GOSS,
Plaintiffs,

versus

DOBBS MOBILE BAY, dba TREADWELL FORD; FORD LIFE INSURANCE COMPANY, *et al.*,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF FORD LIFE INSURANCE COMPANY

This matter having come to be heard by the Court on the Motion For Summary Judgment filed by defendant, Ford Life Insurance Company, on the 26th day of March, 1993, and the Court having considered the excerpts of depositions, exhibits, and briefs submitted on behalf of Ford Life in support of its motion, together with the brief, deposition excerpts, and exhibits submitted as of the 26th day of March, 1993, in opposition thereto by the plaintiffs, the Court finds and concludes as follows:

STATEMENT OF THE CASE

1. The plaintiffs, Joyce Miller, as administratrix for the Estate of Mearl Miller, and Paula Goss, individually, filed their original Complaint on May 6, 1992, against Ford Life Insurance Company (Ford Life), Dobbs Mobile Bay, Inc. d/b/a Treadwell Ford (Treadwell), and several fictitious parties. The plaintiffs filed an Amended

Complaint on or about December 9, 1992, adding Central Bank of the South as an involuntary plaintiff. The Amended Complaint asserted the same allegations against Ford Life and Treadwell as in the original Complaint.

2. In both the original and amended complaints, plaintiffs allege four causes of action. The First Cause of Action is predicated upon alleged fraudulent representations made by defendants, Ford Life and Treadwell, in connection with the purchase by Mearl M. Miller, deceased, of credit life insurance at the time of his purchase of a 1985 Ford LTS Crown Victoria from Treadwell. Specifically, the plaintiffs allege that defendants intentionally, recklessly, or by mistake, represented to Mearl Miller (deceased) and Paula Goss, his daughter, that defendants would pay benefits under the credit life insurance policy, which, plaintiffs allege were fraudulent representations. In the Second Cause of Action, plaintiffs contend that Treadwell fraudulently represented to Mearl Miller (deceased) and Paula Goss, his daughter, that Treadwell Ford would not approve the sale of the vehicle without the purchase of credit life insurance. In the Third Cause of Action, the plaintiffs allege breach of the credit life insurance contract against both Treadwell and Ford Life. In the Fourth Cause of Action, the plaintiffs allege bad faith refusal to pay against Ford Life in connection with its refusal to pay benefits under the credit life insurance contract.

3. In its anwer, Ford Life denied the material allegations of all of the four causes of action. In addition, Ford Life affirmatively plead that the Complaint fails to state a claim against it upon which relief may be granted; that the First, Second and Fourth Causes of Action are barred by the two year Statute of Limitations under Alabama Code, § 6-2-38 (1975); that the First and Second Causes of Action are barred on the grounds that the alleged fraud claims did not survive the death of Mearl M. Miller under Alabama Code, § 6-5-462

(1975); and that the plaintiffs did not justifiably rely to their detriment upon any alleged misrepresentations made by defendant.

4. On March 11, 1993, an appearance was filed by J. Patrick Courtney, III, as additional counsel to plaintiffs and on the same date, plaintiffs filed a Motion For Leave To Amend Their Complaint, together with a proposed Amended Complaint.

5. The Amended Complaint filed on March 11, 1993, added several new claims of relief against the same defendants, which included: fraudulent concealment under circumstances which give rise to the duty to disclose; intentional failure to investigate; breach of a fiduciary duty; negligence in selling a policy; negligence in supervision of the procedure of the sale of an insurance policy; and, conspiracy to defraud. Further, it appears that plaintiffs attempted to add Joyce Miller McLeod, individually, as a plaintiff, as it appears in the caption of the proposed Second Amended Complaint without any further discussion or mention of her as a plaintiff and without having filed leave of Court to add her, individually, as a plaintiff.

6. Defendants, Ford Life and Treadwell Ford, both objected to Plaintiffs' Motion To Amend The Complaint and moved to strike the proposed Amended Complaint on the grounds that they would suffer substantial prejudice as a result of the late filing of the Amended Complaint with the case having been set for trial on April 7, 1993.

7. The defendant, Ford Life, filed its Motion For Summary Judgment on March 9, 1993, together with excerpts of depositions and exhibits to the depositions in support of its motion, and had previously filed a Motion To Dismiss on September 4, 1992, which had been partially granted and a renewed Motion To Dismiss on February 17, 1993. Treadwell Ford also filed its Motion

For Summary Judgment supported by deposition excerpts and exhibits on March 9, 1993. Both Ford Life and Treadwell submitted briefs in support of their Motions For Summary Judgment.

8. The plaintiffs filed their Brief In Opposition To The Motions For Summary Judgment on March 26, 1993, together with an affidavit of plaintiff, Paula Goss, on March 26, 1993.

9. The Court took the Motions For Summary Judgment and responses thereto under submission on March 26, 1993 and did not order a continuance to permit the filing of additional evidence nor did the Court order that the parties could further supplement the evidence in the record before the Court.

10. Thereafter, the plaintiffs attempted to file an Affidavit of Allen Bishop on March 29, 1993, in opposition to the Motions For Summary Judgment and also attempted to file additional evidence in opposition to said motions on April 7, 1993.

FINDINGS OF FACT

PURCHASE OF VEHICLE

1. On or about February 28, 1989, Mearl M. Miller, deceased, purchased a 1985 Ford LTD Crown Victoria from a salesman at Dobbs Mobile Bay, Inc., dba Treadwell Ford (hereinafter "Treadwell Ford").

2. At the same time that he purchased the vehicle, the deceased, Mearl M. Miller, solely, purchased a Group Credit Life Insurance Coverage on his life from Ford Life Insurance Company (hereinafter "Ford Life").

3. In connection with his purchase of the vehicle and Credit Life Policy, Mearl Miller, deceased, executed an installment Sale Contract (Security Agreement), a Retail Buyer's Order, an Odometer Mileage Statement, a Credit Application, an Application For A Certificate Of Title,

and the Ford Life Insurance Company Credit Life Insurance Policy, all of which reflect that Mearl Miller was the sole purchaser of the vehicle. He was also issued a Bill of Sale to the vehicle which is in his name only.

4. Mearl M. Miller, deceased, was accompanied on his visit to Treadwell Ford by his daughter, Paula Goss, and son-in-law, Howard Lee Goss.

5. Plaintiff, Joyce Miller McLeod, the widow of Mearl Miller, was not present at the dealership when Mr. Miller purchased the vehicle.

6. Neither Mearl M. Miller's son-in-law, Howard Lee Goss, nor his daughter, Paula Goss, were a party to the transaction for the purchase of the vehicle.

KNOWLEDGE THAT INSURANCE WAS OPTIONAL

7. According to his widow, Joyce Miller McLeod, Mearl M. Miller, deceased, routinely purchased credit life insurance when he purchased items on credit such as vehicles and furniture. Mearl M. Miller's daughter, Paula Goss, acknowledged that he routinely purchased credit life insurance and knew about restrictions on buying such insurance.

8. Even after the Treadwell Ford employee offered to "strike up something else", Mearl M. Miller, deceased, decided to purchase the credit life insurance policy.

9. The deceased, Mearl M. Miller completely and thoroughly read the finance contract which contained his election to purchase the Credit Life Insurance coverage, understood it, and knew that the purchase of the insurance was strictly optional.

10. The Treadwell Ford employee who sold the credit life insurance policy to Mearl M. Miller, deceased, made no additional promises to Mearl M. Miller as an encouragement for or inducement for him to purchase the policy.

11. The Installment Sale Contract (Security Agreement) provided in paragraph 8 that the purchase of the credit life insurance was optional. Mearl Miller, deceased, signed his name on paragraph 8, acknowledging that the purchase of the credit life insurance was optional.

12. Approximately one week after Mearl Miller, deceased, purchased the vehicle and the Credit Life Insurance Policy, he and his widow, Joyce Miller McLeod, had a discussion regarding the purchase of the insurance and they both looked over the documents. During this discussion, Mearl Miller and his widow specifically discussed the credit life insurance and the fact that it was optional rather than mandatory. During this discussion, Mearl Miller acknowledged to Joyce Miller McLeod that he knew that the purchase of the credit life insurance was not a mandatory prerequisite to his purchase of the vehicle.

13. The deceased, Mearl Miller, and his widow, Joyce Miller McLeod knew by the first week in March of 1989 [one week after the purchase of the vehicle and credit life policy] that the alleged misrepresentations by the Treadwell employees that the credit life policy was a mandatory prerequisite to the purchase of the vehicle were indeed false statements.

BENEFICIARY OF VEHICLE PURCHASE

14. The vehicle purchased from Treadwell Ford was for the use of Joyce Miller McLeod, wife of the deceased, Mearl M. Miller; and neither Paula Goss nor Howard Goss were to use the vehicle for their personal use.

HEALTH OF DECEDENT AT TIME OF PURCHASE

15. At the time of his execution of the "good health" statement embodied in the Ceritficate of Insurance, Mearl M. Miller, deceased, was, without Ford Life's knowledge receiving Social Security Disability benefits, and had,

without Ford Life's knowledge, retired from Ingalls Shipbuilding for medical reasons.

16. For the nine month period immediately preceding his signing of the "good health" statement, Mearl M. Miller, deceased, had been admitted to Singing River Hospital at least five times for treatment of Severe Asthmatic Bronchitis, Severe COPD (Chronic Obstructive Pulmonary Disease), and a Large Duodenal Ulcer.

17. From October 31, 1988 to January 17, 1989 [just one month before signing the "good health" certificate], Mearl M. Miller, deceased, was a patient at Ocean Springs Hospital where he was treated for being in the end stage of disabling asthmatic bronchitis, severe emphysema, and COPD.

18. Based upon his emphysema and other medical problems, the deceased, Mearl M. Miller, when he was examined by Dr. Lorino on January 20, 1989 [approximately one month prior to purchasing the Group Credit Life Insurance coverage] was in the "end stage" of emphysema.

19. Just three weeks before signing the "good health" certificate, Mearl M. Miller, deceased, spent a week [February 1 through February 7, 1989] in Providence Hospital during which time he was treated for acute exacerbation of his chronic obstructive pulmonary disease secondary to purulent bronchitis.

20. On February 14, 1989 [just two weeks before signing the "good health" certificate], Mr. Mearl M. Miller, deceased, visited Dr. Lorino's office and was noted to continue to have a lot of trouble with air flow obstruction and wheezing despite high doses of corticosteroid use, as well as other bronchodilator medications.

21. Mearl M. Miller's health had deteriorated to such an extent that he had to be driven by others for at least two years prior to his signing the "good health" statement.

22. For at least two years prior to signing the "good health" certificate, the deceased, Mearl M. Miller, could not walk long distances without severe loss of breath.

23. The deceased, Mearl M. Miller, was in extremely bad health at the time of his execution of the "good health" statement.

PLAINTIFFS' KNOWLEDGE OF DECEDENT'S POOR HEALTH

24. Plaintiff, Joyce Miller McLeod, Mearl M. Miller's surviving widow, believed him to be in severely poor health at the time of his execution of the "good health" statement.

25. Plaintiff, Paula Goss, does not dispute Ford Life's contention that Mearl M. Miller was in severely poor health at the time of his execution of the "good health" statement, and states that the deceased, Mearl M. Miller, "did not know from this day to the next if he would still be alive or not."

DECEDENTS' KNOWLEDGE OF POOR HEALTH

26. At the time that he signed the "good health" statement, the deceased, Mearl M. Miller, knew that he was in poor health.

27. Emphysema is a permanent, progressive, non-reversible disease.

EXTENT OF RELIANCE BY PAULA GOSS

28. Plaintiff Paula Goss did not provide her vehicle as a trade-in, for, nor did she provide any other consideration for Mearl M. Miller's purchase of the vehicle in question from Treadwell Ford; instead, it was an established practice, followed in this instance, for the deceased, Mearl M. Miller, prior to purchasing a newer vehicle, to swap vehicles with his daughter, Paula Goss, and then

use the vehicle obtained from her as his trade-in on the newer vehicle.

29. The referenced swap of vehicles between deceased and his daughter, in this instance, occurred on February 25, 1989, three days before the deceased, Mearl M. Miller, purchased the subject vehicle and the Group Credit Life Insurance coverage in question.

IDENTITY OF TREADWELL EMPLOYEE

30. Plaintiffs have not sufficiently identified and cannot sufficiently identify the Treadwell Ford employee who allegedly sold them, and allegedly made the misrepresentations regarding, the Credit Life Insurance policy. They do not know his name, approximate weight, height, color of hair or whether he wore glasses; the only thing they know for certain is that he was a white male, and that they would not recognize him if they saw him today.

In fact, Plaintiff Paula Goss and her husband Howard Goss do not even agree as to the title of the unidentified Treadwell employee who allegedly made the fraudulent misrepresentations, or the capacity in which he was acting. Howard Goss, husband of Plaintiff, Paula Goss, states it was the "used car manager"; Plaintiff Paula Goss states is was the "insurance guy".

SCOPE OF AGENCY

31. Robert Wayne Sparks, the Treadwell employee who was [at the time the deceased, Mearl M. Miller, acquired the referenced Group Credit Life Insurance Policy] designated by Ford Life as its agent, was a "soliciting agent" who had no authority to change, alter, vary or waive any of the terms or conditions contained in the policies.

32. According to the terms of the controlling agreement executed between Treadwell Ford (Sparks' employer) and Ford Life [in effect at the time of and prior

to the alleged misrepresentations of Treadwell Ford's employee]:

> No agent is authorized to alter or amend this Policy or any Certificate issued hereunder, to waive any conditions or restrictions contained herein, to extend the time for paying a premium, or to bind Ford Life by making any promises or representations or by giving or receiving any information. This Policy or any Certificate issued hereunder can not be amended or altered or its conditions waived in any respect except by written agreement endorsed hereon or attached hereto and signed by an authorized officer of Ford Life.

33. Robert Wayne Sparks, at the time of the alleged misrepresentations by Treadwell Ford's employee, was registered as a "limited agent", not a general agent, of Ford Life with the Department of Insurance of the State of Alabama.

DATE OF DEATH & SUBSEQUENT EVENTS

34. Mearl M. Miller died on January 9, 1990.

35. Mearl M. Miller died a pulmonary death caused by emphysema and lung cancer working in conjunction with each other.

36. Mearl M. Miller, deceased, would have died from the complications existing on the day that he signed the "good health" statement had he not contracted cancer.

37. On or about March 5, 1990, Central Bank of the South filed a Notice of Mearl M. Miller's death, and a Statement of Claim.

38. On or about May 9, 1990, after an investigation of the records of S.T. Guttman, M.D., Singing River Hospital, Ocean Springs Hospital, and Gary Groff, M.D., which were received by Ford Life prior to its denial of the claim form, defendant-Ford Life rejected Central

Bank's claim under the policy, and sent copies of the rejection letter to the Estate of Mearl M. Miller, deceased, and to Treadwell Ford.

39. Although Central Bank of the South and Treadwell Ford received their copies of the May 9, 1990, letter denying Central Bank's claim, Joyce Miller McLeod, as Administratrix of the Estate of Mearl M. Miller, deceased, denies ever receiving a copy of said May 9, 1990 letter from Defendant-Ford Life.

40. Neither Joyce Miller, individually nor Joyce Miller McLeod, as Administratrix of the Estate of Mearl M. Miller, deceased, has submitted to Ford Life any claim form or proof of loss seeking benefits under the policy.

41. Plaintiff Paula Goss has not contacted Defendant-Ford Life concerning her father's death, and neither has she filed the requisite claim form or proof of loss.

42. Plaintiff Joyce Miller McLeod received notice of the denial of Central Bank's claim, at the very latest, in June or July of 1990, but took no steps to investigate why the claim was denied.

SUPPLEMENTAL FINDINGS OF FACT CONCERNING THE AFFIDAVIT OF PAULA GOSS

The affidavit of Plaintiff, Paula Goss, filed in opposition to the Defendants' Motions for Summary Judgment:

(a) is entitled to no weight or consideration as regards the following allegations of the affidavit since such allegations contradict the following deposition testimony of the affiant:

AFFIDAVIT ARGUMENTS	CONTRADICTORY DEPOSITION TESTIMONY
1. "[A]fter being apprised of my father's health condition, [the agent] indicated that would not be a 'problem' and that the insurance would be effective." Pg. 2.	Q: "Did he [the agent] make a promise to him [Mearl Miller] that he would do something extra if he would buy that credit life?" A: "No." Pg. 38, lns. 19-21.

Q: "Was there any discussions with regard to . . . what benefits would or wouldn't be paid under the coverage?"

A: "No."

Q: "Wasn't discussed at all?"

A: "No." 2nd Dep., Pg. 11, ln. 23 through Pg. 12, ln. 10.

2. "I allowed my 1978 Chevrolet Impala station wagon to be traded in toward the purchase of the new car." Pg. 3.

Q: "[Y]ou all had made the deal that you were going to swap those two vehicles even before you went shopping for the '85 . . . is that correct?"

A: "Yes." 2nd Dep. Pg. 9, lns. 1-4.

Q: "But as far as the method of trading the cars, that was something you agreed on, and you had done something similar in the past."

A: "Yes. This was not the first time."

Q: "And, that was a fair deal from your point of view; is that right?"

A: "Yes. I got a good car out of the deal." Pg. 14 lns. 5-11.

(b) is entitled to no weight or consideration as regards the following allegations of the affidavit since such allegations are hearsay, not based on first hand personal knowledge, not authenticated, and are argumentative, speculative, conclusory, conjectural, and self-serving:

1. "The factual allegations contained therein [the Second Amended Complaint] are true and correct." Pg. 2.

2. "At the time neither my father nor myself were aware that he had any health problems of significance other than emphysema." Pg. 2.

3. "It was that condition [lung cancer], not emphysema, which caused his death." Pg. 2.

4. "Had we been advised that my father's emphysema condition violated the 'good health certificate' on the insurance application . . . we would not have paid for that insurance." Pg. 2.

5. "We had no reason to dispute or doubt the Ford Life sales agent's representations and assurances made with respect to my father being covered by the policy." Pg. 2.

6. "The 'good health certificate' was somewhat vague . . ." Pg. 3.

7. "[W]e fully discussed my father's health condition with the sales agent." Pg. 3.

8. "It was our impression that the [sales agent] had a great deal more experience in handling matters of this sort than we did and, as such, we trusted him when he told us that the emphysema did not violate the good health provision." Pg. 3.

9. "We did not discover that the representations made to us . . . were false until some time after . . . May 9, 1990." Pg. 3.

10. "Our discovery of Defendants' fraudulent activities was within two years preceding the filing of this lawsuit." Pg. 3.

11. "as a result of Ford Life not paying on its policy as represented, both Joyce Miller and myself have been directly injured." Pg. 4.

12. "[W]e [Joyce Miller and Paula Goss] as individuals and as beneficiaries of my father's estate, have lost the amounts paid down for the purchase of the LTD and the amounts paid on the loan prior to my father's death." Pg. 4.

13. "If [the sales agent] had told me the truth . . . I certainly wouldn't have traded in my car toward purchase of the new vehicle." Pg. 5.

14. "I feel sure my father wouldn't have bought the insurance if we had been advised of that." Pg. 5.

15. "If . . . we couldn't buy the car without the insurance, we wouldn't have bought the car." Pg. 5.

16. "I feel we were lied to, that my father and I relied upon the [agent] to tell me the truth, that we were not told the truth, and that my mother and I have been damaged in a variety of ways as a result." Pg. 5.

17. "My perception is that if Ford Life can avoid the consequences of its wrong doings . . . they will be able to continue doing this to many, many, more people." Pg. 5.

CONCLUSIONS OF LAW

SUMMARY JUDGMENT

1. When a summary judgment motion is filed, the movant bears the initial burden of making a prima facie showing that no genuine issue of material fact exists and that he is entitled to a judgment as a matter of law. 56(c), ARCP; *Tripp v. Humana, Inc.*, 474 So.2d 88 (Ala.1985); *Duncan v. Auto Owners Insurance Co.*, 592 So.2d 568 (Ala.1992).

2. Once the movant meets his initial burden, the burden shifts to the non-movant to rebut this initial showing by producing substantial evidence creating a genuine issue of material fact or by showing that the movant is not entitled to a judgment as a matter of law. Section 12-21-12, *Code of Alabama*, 1975, (Supp. 1988); *Duncan v. Auto Owners Insurance Co.*, 592 So.2d 568 (Ala. 1992); *West v. Founders Life Ins. Co. of Florida*, 547 So.2d 870, 871 (Ala.1989).

3. The trial court in considering a motion for summary judgment must consider the movant's evidence as

uncontroverted and enter summary judgment if the opposing affidavit does not contradict that presented by the movant. *Garrison v. Stanford,* 586 So.2d 1 (Ala.Civ. App.1991); *Turner v. Systems Fuel, Inc.,* 475 So.2d 539 (Ala.1985).

4. An affidavit opposing a motion for summary judgment must be made on personal knowledge and must set forth facts to show that the evidence would be admissible as testimony to contradict the movant's evidence. *Crawford v. Hall,* 531 So.2d 874 (Ala. 1988); *Richardson v. Kroger Co.,* 521 So.2d 934 (Ala.1988); *Butler v. Michigan Mutual Ins. Co.,* 402 So.2d 949 (Ala.1981); *Arrington v. Working Woman's Home,* 368 So.2d 851 (Ala.1979).

5. Matters based upon "information" and "belief" are essentially hearsay, and are insufficient to raise a material issue of fact in order to bar summary judgment. *Gray v. Reynolds,* 533 So.2d 68, 78 (Ala. 1989); *Welch v. Houston County Hospital Board,* 502 So.2d 340 (Ala. 1987).

6. An affidavit opposing a motion for summary judgment may not contradict prior deposition testimony of that person or party. *Robinson v. Hank Roberts, Inc.,* 514 So.2d 958, 961 (Ala.1987) citing *Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc.,* 736 F.2d 656, 657 (11th Cir. 1984):

> "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party can not thereafter create such an issue with an affidavit that merely contradicts without explanation previously given clear testimony."

7. Summary judgment is not prevented by conclusive allegations or speculation that a fact issue exists. *Murray v. Timberlake,* 564 So.2d 885 (Ala.1990); *Williams v. Palmer,* 277 Ala. 188, 168 So.2d 220 (Ala.1964);

Charles J. Arndt, Inc. v. City of Birmingham, 547 So.2d 397 (Ala.1989).

8. Bare arguments or conjecture will not satisfy the burden of a party opposing summary judgment to offer facts to defeat the motion. *Riggs v. Bell*, 564 So.2 882 (Ala.1990); *Thibodeaux v. Holk*, 540 So.2d 1378 (Ala. 1989).

9. Affidavits opposing motions for summary judgment must be filed and served at least two (2) days prior to the hearing on the motion. (56(c)(2) ARCP.

10. In deciding whether to grant or deny a motion for summary judgment, the trial court can consider only the material before it at the time of submission of the motion, and any material filed after submission is too late. *Garrison v. Stanford*, 586 So.2d 1, (Ala. Civ. App. 1991); *Willis v. Ideal Basic Industries, Inc.*, 484 So.2d 444 (Ala. 1986); *Mathis v. Jim Skinner Ford, Inc.*, 361 So.2d 113 (Ala. 1978).

11. In considering whether to allow supplemental affidavits, the trial court may, at its discretion, consider a tardy affidavit if it is presented to him before his ruling on the summary judgment motion. 56(e), ARCP; *Guess v. Snyder*, 378 So.2d 691, 693 (Ala. 1979); *Moore v. Glover*, 501 So.2d 1197 (Ala. 1986); *Roscoe v. Jones*, 571 So.2d 1039 (Ala. 1990).

12. The mere pendency of discovery does not bar summary judgment; rather, the burden is upon the non-moving party to show that the evidence subject to production or the answers to the interrogatories were crucial to the non-moving party's case. *Hirsch v. Board of Commissioners of Alabama State Bar*, 533 F.2d 942 (5th Cir., 1976); *Noble v. McManus*, 404 So.2d 248 (Ala. 1987); *Reeves v. Porter*, 521 So.2d 963 (Ala. 1988); *Waterview Development, Inc. v. Eureka, Inc.*, 512 So.2d 916 (Ala. 1987).

CONTRACT

13. The only proper parties in a suit for life insurance policy benefits are the named insureds (if other than the decedent), the administratrix of the Estate, and possibly named beneficiaries if payable to other than the Estate. *Cincinnati Insurance Co. v. Girod,* 570 So.2d 595 (Ala. 1990); *Coastal States Life Insurance Co. v. Glass,* 278 Ala. 656, 180 So.2d 255 (Ala.1965).

14. An insurance policy is unenforceable if the insured makes statements that were: (a.) fraudulent; (b.) material either to the acceptance of the risk or to the hazard assumed by the insurer; or, (c.) if the insurer in good faith would either not have issued the policy or would not have issued a policy at the premium rate as applied for. Section 27-14-7, *Code of Alabama* (1975).

15. Insurers have the right to expect policy applicants to tell the truth, and they do not have a duty to inquire further to verify that the applicant has told them the truth. *American General Life & Accident Ins. Co. v. Lyles,* 540 So.2d 696 (Ala. 1988); *Old Southern Life Insurance Co., Inc. v. Spann,* 472 So.2d 987 (Ala. 1985).

16. Under the statute, insurers may void a policy even if the decedent made innocent misrepresentations. Section 27-14-7, *Code of Alabama* (1975); *Duren v. Northwestern National Life Ins. Co.,* 581 So.2d 810 (Ala.1991); *Taylor v. Golden Rule Ins. Co.,* 544 So.2d 932 (Ala. 1989).

17. The existence and scope of an agency relationship is for the jury to determine only "where the evidence is in conflict." *St. Paul Fire and Marine Insurance Co. v. Anderson,* 358 So.2d 151 at 158 (Ala. Civ. App. 1977), citing *Treadwell Ford, Inc. v. Wallace,* 49 Ala.App. 308, 271 So.2d 505 (1973).

18. Agents may only bind their principal insurance companies in one of two ways: either they are general

agents, with the actual authority to bind their principals, or they are somewhat less than general agents, with the apparent authority to bind their principals. *McGhee v. Paramount Life Insurance Co.*, 385 So.2d 969 (Ala. 1980); *Hartford Accident & Indemnity Co. v. Oglesby*, 293 Ala. 602, 308 So.2d 695 (1975); *Fidelity & Casualty of New York v. Thomas*, 315 F.Supp. 89 (M.D. Ala. 1970).

19. "The doctrine of apparent authority does not rest upon what one thinks an agent's authority may be, or what the agent holds out his authority to be. Rather, the doctrine of apparent authority is based on the principal's holding the agent out to a third person as having the authority under which he acts." *Automotive Acceptance Corp. v. Powell*, 45 Ala.App. 596, 234 So.2d 593 (1969).

20. Unlike a "general agent," a "soliciting agent" has no authority to bind his insurer principal in contract, nor does he have the power to alter the contract. *Coleman v. Tabor*, 572 So.2d 399 (Ala.1990); *Autrey v. Blue Cross and Blue Shield of Alabama*, 481 So.2d 381 (Ala. 1985); *Walton v. Prudential Insurance Co.*, 399 So.2d 285 (Ala.1981); *McGhee v. Paramount Life Insurance Co.*, 385 So.2d 969 (Ala. 1980) citing *Liberty National Life Insurance Co. v. Staggs*, 242 Ala. 363, 6 So.2d 432 (1942).

BAD FAITH

21. A successful claim for relief asserting bad faith must show: (1) the existence of an insurance contract; (2) breach by the insurer; (3) intentional refusal to pay the insurance claim; (4) absence of any legitimate or debatable reason for refusal; (5) the insurer's actual knowledge of the absence of an arguable reason; and, (6) the insurance company's intentional failure to determine whether there was a legitimate or arguable reason to refuse to pay the claim. *Aplin v. American Sec. Ins. Co.*, 568 So.2d 757 (Ala. 1990); *Koch v. State Farm*

Fire and Casualty Co., 565 So.2d 226 (Ala. 1990); *Continental Electric v. American Employers Insurance Co.*, 518 So.2d 83, 86 (Ala.1987); *Mueller v. Hartford Ins. Co. of Ala.*, 474 So.2d 554, 556 (Ala.1985).

22. In order for an insured to recover on a bad faith claim, insured must show that if the contract had been tried on the date of denial the insured would have been entitled to a directed verdict. *Smith v. NBL Assurance Corp.*, 589 So.2d 691 (Ala.1991); *Cook v. Trinity Universal*, 584 So.2d 813 (Ala.1991); *Koch v. State Farm Fire & Casualty Co.*, 565 So.2d 226 (Ala.1990); *Insurance Co. v. Citizens Bank*, 491 So.2d 80 (Ala.1986).

23. The burden upon Plaintiffs of proving no "debatable reason" is an onerous one: "that means an arguable reason, one that is open to dispute or question." *National Security Fire & Casualty Co. v. Bowen*, 417 So.2d 179, 183 (Ala.1992). "[T]he insured must eliminate any arguable reason propounded by the insurer for refusing to pay the claim." *Burns v. Motors Ins. Corp.*, 530 So.2d 824, 827 (Ala. Civ. App. 1987).

FRAUD

24. Fraud based claims of relief categorically do not survive in favor of the deceased's personal representative. Section 6-5-462, *Code of Alabama* (1975); *Davis v. Southern Life Insurance Co.*, 494 So.2d 48 (Ala.1986).

25. The basic elements of fraudulent misrepresentation are: (a.) misrepresentation of a material fact; (b.) made willfully to deceive or recklessly without knowledge; (c.) justifiable reliance the Plaintiff; and, (d.) damages. *Bama Budweiser v. Anheuser-Busch*, 611 So.2d 238 (Ala.1992) citing *Herrington v. Johnson, Ross and Hayes, Inc.*, 577 So.2d 537 (Ala.1991); *Continental Electric Co., et al, v. America Employers Insurance Co.*, 518 So.2d 83 (Ala.1987); *Taylor v. Moorman Manufacturing Co.*, 475 So.2d 1187 (Ala.1985); and *Land*

and Associates, Inc. v. Simmons, 562 So.2d 140 (Ala. 1989).

26. For actions in fraud, the cause of action accrues and the statute begins to run from the time the fraudulent act is committed. *Myers v. Geneva Life Ins. Co.*, 495 So.2d 532 (Ala.1986); *Garrett v. Raytheon Co.*, 368 So.2d 516 (Ala.1979).

27. Facts which invoke inquiring in the mind of a man of reasonable prudence and which when followed up would have led to a discovery of the fraud, constitutes sufficient evidence of discovery. *Kelly v. Alexander*, 554 So.2d 344 (Ala.1989) citing *Willcutt v. Union Oil Co. of California*, 432 So.2d 1217, 1919-1220 (Ala.1983); *Johnson v. Shenandoah Life Ins. Co.*, 291 Ala. 389, 397; 281 So.2d 636 (Ala.1973); *Butler v. Guaranty Savings and Loan Association*, 251 Ala. 449; 37 So.2d 638 (1948).

28. A fraud action must be commenced within two years of the date of discovery of the alleged fraud. *Locker v. Phoenix City Investment Co.*, 488 So.2d 1353 (Ala.1988); *Thompson v. Vaughn*, 592 So.2d 585 (Ala. 1982).

29. The burden is on the Plaintiff to show that they come within the "saving clause" under Section 6-2-3, *Code of Alabama* 1975, (Supp. 1988); *Miller v. Mobile County Board of Health*, 409 So.2d 420 (Ala.1981); *Lamplighter Dinner Treater, Inc. v. Liberty Mutual Ins. Co.*, 792 F.2d 1036 (11th Cir., 1986).

ADDITIONAL AND SUPPLEMENTAL CONCLUSIONS OF LAW BASED UPON PLAINTIFFS' SECOND AMENDED COMPLAINT

TIMELINESS

1. As of August 1, 1992, Amended Rule 15(a) ARCP mandates that an amendment to a complaint within forty-two days of the first trial setting requires leave of Court

and that such leave shall only be given upon a showing of good cause.

The Committee Comments to the amended Rule 15(a) states:

> "Because an amendment within the forty-two day period will frequently force a continuance of the trial of the case, the Committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the Rule requires a showing of good cause for any amendment within this period."

FRAUDULENT CONCEALMENT/BREACH OF FIDUCIARY DUTY

2. The essential elements of fraud by silence are: (a.) a duty to disclose the facts; (b.) concealment or non-disclosure of material facts; (c.) inducement of the Plaintiff to act; and, (d.) action by the Plaintiff to his injury. *Bama Budweiser v. Anheuser-Busch,* 611 So.2d 238 (Ala. 1992) (citing *Wilson v. Brown,* 496 So.2d 756 (Ala. 1986).

3. Whether that duty to disclose exists is a legal question to be determined by the Court. *Berkland Co. Contractors v. Providence Hospital,* 454 So.2d 496 (Ala. 1984); *Dominick v. Dixie National Life Insurance Co.,* 809 F.2d 1559 (11th Cir., 1987).

4. Mere silence is not a fraud, unless a confidential relations or special circumstance exist. Section 6-5-102, *Code of Alabama* (1975); *Berkland Co. Contractors v. Providence Hospital,* 454 So.2d 496 (Ala.1984); *Hammond v. City of Gadsden,* 493 So.2d 1374 (Ala.1986); *Cary v. Kirkland,* 514 So.2d 970 (Ala.1987).

5. In situations where both parties are knowledgeable, there is no duty of disclosure on behalf of one party for the benefit of another party. *Trio Broadcasters, Inc. v. Ward,* 495 So.2d 621. *Dominick v. Dixie National Life Insurance Co.,* 809 F.2d 1559 (11th Cir., 1987).

6. Sellers of insurance have no fiduciary relationship precipitating a duty to disclose while negotiating a contract. Although an insurance salesman has been held to be an agent of the insured, the insurer, or both, an insurance salesman is not an agent of the insured until the insurence contract has been concluded. *Boyette v. Wolf Bay Associates,* 568 So.2d 765 (Ala.1990); *Washington National Insurance Co. v. Strickland,* 491 So.2d 872, 874-875 (Ala.1985); *Highland Underwriters Ins. Co. v. Elegant End, Inc.,* 361 So.2d 1016 (Ala.1978).

NEGLIGENCE

7. Negligence has three essential elements: (1) A duty owed to the Plaintiff by the Defendant; (2) breach of that duty; and, (3) injury proximately caused by the breach. *Beathea v. Escambia County,* 514 So.2d 872 (Ala.1987).

CONSPIRACY

8. The statute of limitations on the claim for conspiracy begins to run at the same time as does the statute for the underlying fraud claim. *Johnson v. Life Insurance Co.,* 581 So.2d 438 (Ala.1991); *Kelly v. Alexander,* 554 So.2d 343 (Ala.1989).

9. When no actionable wrong remains to support it, all claims for conspiracy must fail. *Betts v. McDonald's Corp.,* 567 So.2d 1252 (Ala.1990); *Massengill v. Malone Freight Lines,* 538 So.2d 784 (Ala.1988); *Purcell Co. v. Spriggs Enterprises, Inc.,* 431 So.2d 515 (Ala.1983).

RULINGS OF THE COURT

PROCEDURE

1. The Court finds that defendant, Ford Life, has submitted substantial evidence in support of its Motion for Summary Judgment demonstrating that it was entitled to summary judgment as a matter of law, and therefore,

the burden shifted to the plaintiffs to rebut the evidence submitted by defendants shifted to the plaintiffs. *Maharry v. City of Gadsden,* 587 So.2d 966 (Ala. 1991).

2. The Court finds that the plaintiffs have failed to meet their burden of rebutting, by substantial evidence, such defendant's evidence supporting and entitling it to a summary judgment so as to create a genuine issue of material fact. *Duncan v. Auto Owners Insurance Co.,* 592 So.2d 568 (Ala. 1992).

3. The Court finds that both the affidavit of Paula Goss and the affidavit of Alan Bishop filed in opposition to the Motions for Summary Judgment are clearly untimely. First, the affidavit of Paula Goss was filed on the same day that such defendant's Motion for Summary Judgment was argued, and thus violated ARCP 56(c)(2) which requires that such affidavit be filed with the court two days before oral argument. Next, the affidavit of Alan Bishop was filed three days after the Court took this defendant's Motion for Summary Judgment under submission. *Garrison v. Stanford,* 586 So.2d 1 (Ala. Civ. App. (1991). Further, the Court did not order a continuance to permit the filing of additional evidence nor did the Court order that the parties could further supplement the evidence in the record before the Court as allowed by Alabama Rules of Civil Procedure, Rule 56(f). These items of evidence, are, therefore, barred from consideration by the Court in rendering this Order.

4. Notwithstanding the untimely filing which bars the affidavit of Paul Goss from the Court's consideration, the Court further finds that the affidavit of Paula Goss is substantively barred, and entitled to no weight nor consideration since it contains testimony, contradictory of previous deposition testimony of the affiant; hearsay; statements not based upon personal knowledge; statements that are not authenticated; and argumentative, speculative, and conclusory allegations. *Crawford v. Hall,* 531 So.2d 874 (Ala. 1988); *Murray v. Timberlake,* 564 So.2d 885 (Ala. 1990).

5. The Court finds that plaintiffs have failed to show that any sought or/and outstanding discovery is crucial to their case. *Reeves v. Porter*, 521 So.2d 963 (Ala. 1988).

CONTRACT CLAIMS OF RELIEF

6. The Court finds that neither plaintiffs, Paula Goss, nor Joyce Miller, individually, has standing to assert a claim for relief under the insurance policy against defendant, Ford Life, because the only proper party to assert a claim on the policy is the administratrix of Mearl M. Miller's estate. *Cincinnati Insurance Co. v. Girod*, 570 So.2d 595 (Ala. 1990).

7. The Court further finds that the claim for relief on the policy by Joyce Miller as administratrix of Mearl Miller's estate fails because the decedent, Mearl Miller, by signing the "good health" statement, knowing that he had severe emphysema and was in bad health, categorically made a fraudulent statement, or a false statement that materially increased defendant, Ford Life's, risk of loss. Consequently, the insurance policy is unenforceable. Section 27-14-7, *Code of Alabama* (1975).

8. The Court finds that plaintiffs have not, and, by their own admission, can not properly identify nor authenticate the Treadwell Employee who made the alleged misrepresentations.

9. The Court finds that Robert Wayne Sparks, even if plaintiffs could have proved he was the Treadwell employee with whom they dealt, was, at the time that decedent, Mearl Miller, purchased the Group Term Insurance policy, a "soliciting agent" for Ford Life and as such had no authority to alter the written contract. *Coleman v. Tabor*, 572 So.2d 399 (Ala. 1990).

10. The Court finds that defendant, Ford Life, has not been shown to have held Robert Wayne Sparks out to anyone as having the authority to alter the written insurance agreement. On the contrary, the dealer agree-

ment between Treadwell Ford and Ford Life, and the agency agreement between Ford Life and Mr. Sparks declare that Mr. Sparks had no authority to alter the contract. Consequently, plaintiffs are barred from enforcing the contract. *Automotive Acceptance Corp. v. Powell,* 45 Ala. App. 596, 234 So.2d 593.

BAD FAITH CLAIMS OF RELIEF

11. Plaintiffs have not met the onerous burden required to recover on a bad faith claim, namely, that if the contract had been tried on the date of denial the insured would have been entitled to a directed verdict. *Smith v. NBL Assurance Corp.,* 589 So.2d 691 (Ala. 1991).

12. Because plaintiff Paula Goss and plaintiff Joyce Miller, individually, lack standing to assert a claim on the contract, they lack standing to assert a claim for bad faith; Joyce Miller, as administratrix of the estate of Mearl Miller may not assert a claim on the contract because of the fraudulent misrepresentations made by decedent, Mearl Miller. Consequently, plaintiffs may not present a claim of relief for bad faith. *Cincinnati Insurance Co. v. Girod,* 570 So.2d 595 (Ala. 1990); *Duren v. Northwestern National Life Ins. Co.,* 581 So.2d 810 (Ala. 1991); *Smith v. NBL Assurance Corp.,* 589 So.2d 691 (Ala. 1991).

13. Moreover, the Court finds that defendant, Ford Life, had a legitimate reason for refusing to pay policy benefits based upon the records of S.T. Guttman, M.D., Singing River Hospital, Ocean Springs Hospital, and Gary Groff, M.D., which were reviewed by Ford Life prior to denial of the claim form presented by Central Bank. Thus, plaintiffs have not, and cannot meet their burden of eliminating any "arguable reason" propounded by Ford Life for refusing to pay the claim. Consequently, plaintiffs cannot be successful in their claim of relief for bad faith. *Aplin v. American Sec. Ins. Co.,* 568 So.2d 757

(Ala. 1990); *Burns v. Motors Ins. Corp.*, 530 So.2d 824 (Ala. Civ. App. 1987).

FRAUD CLAIMS OF RELIEF

14. The Court finds that plaintiffs do not have standing to sue on fraud based claims because fraud claims of relief categorically do not survive in favor of the deceased's personal representative. Section 6-5-462, *Code of Alabama* (1975); *Herrington v. Johnson, Ross and Hayes, Inc.*, 577 So.2d 537 (Ala. 1991).

15. The Court further finds that since the alleged misrepresentations of Treadwell Ford were made solely to Mearl Miller and neither Joyce Miller nor Paula Goss suffered legal detriment nor were they co-buyers of the vehicle or credit life insurance, they have no standing to sue for fraud. *Dennis v. Magic City Dodge, Inc.*, 524 So.2d 616 (Ala. 1988).

16. Notwithstanding, plaintiffs' inability to sue for fraud due to their lack of standing, the Court finds that even if plaintiffs had standing to sue, they are barred by the Statute of Limitations since the statute began tolling at the very latest on the first week of March, 1989, when Joyce Miller discussed the necessity of the insurance policy with decedent, Mearl M. Miller. *Kelly v. Alexander*, 554 So.2d 344 (Ala. 1989); *Miller v. Mobile County Board of Health*, 409 So.2d 420 (Ala. 1981).

17. The Court finds that the proposed Second Amended Complaint filed by plaintiffs on March 11, 1993, was filed ten months after the initial filing of this law suit, without defendant's prior consent and without a showing of any justifiable reason for the delay in asserting of same, and with sparse discovery having been conducted by the plaintiffs during that time and after defendants Ford Life and Treadwell Ford had filed their Motions For Summary Judgment on March 9, 1993. Defendant, Ford Life, timely objected to Plaintiffs' Motion

For Leave To Amend The complaint and timely filed a motion to strike the same. Since the Amended Complaint was filed without defendant, Ford Life's consent, without showing of justifiable reason for the delay in asserting of same, and as the Amended Complaint added new theories to the law suit after the filing of Motions For Summary Judgment, the Court finds that allowance of the Amended Complaint would unnecessarily delay this action and would result in substantial, and undue prejudice to defendant, Ford Life. *Haynes v. Ford Motor Co., Inc.*, 435 So.2d 1227 (Ala. 1983). Accordingly the motion of plaintiffs for leave to file the Amended Complaint is DENIED and the Motion of defendant, Ford Life, to Strike the Amended Complaint is GRANTED.

Notwithstanding the immateriality of plaintiffs' Second Amended Complaint because it was filed without defendant, Ford Life's consent, without a showing of justifiable reason for the delay in asserting of same, and its addition of new theories, as completely addressed hereinabove, the Court further finds that the new claims for relief proposed in the Second Amended Complaint, like plaintiffs' initial four claims for relief, are wholly without merit as follows:

INTENTIONAL FAILURE TO INVESTIGATE CLAIM OF RELIEF

18. The Court finds, based upon the records of S.T. Guttman, M.D., Singing River Hospital, Ocean Springs Hospital, and Gary Groff, M.D., which were received by Ford Life Insurance Company prior to its denial of the claim form sent it by Central Bank of the South, that defendants did not intentionally fail to investigate plaintiffs' claim for relief. Consequently, plaintiffs claim for intentional failure to investigate must fail. *Alpin v. American Sec. Ins. Co.*, 568 So.2d 757 (Ala. 1990).

19. Moreover, to be successful against Defendant, Ford Life, on this bad faith cause of action, Plaintiffs

must show that if the contract had been tried on the date of denial they would have been entitled to a directed verdict. Plaintiff Paula Goss and Plaintiff Joyce Miller, individually, lack standing to assert a bad faith cause of action because they lack standing to assert a claim on the contract; Joyce Miller, as administratrix of the estate of Mearl Miller may not assert a claim on the contract because of the fraudulent misrepresentations made by decedent, Mearl Miller. Consequently, Plaintiffs cannot recover on a claim for relief for bad faith failure to investigate. *Smith v. NBL Assurance Corp.*, 589 So.2d 691 (Ala. 1991).

FRAUDULENT CONCEALMENT/BREACH OF FIDUCIARY DUTY

CLAIMS OF RELIEF

20. The Court finds that neither defendant Treadwell Ford through its employee, nor defendant Ford Life through its agent had a fiduciary relationship precipitating a duty of disclosure to Mearl M. Miller. Consequently, defendant, Ford Life cannot be liable for fraudulent concealment. *Boyette v. Wolf Bay Associates*, 568 So.2d 765 (Ala. 1990).

NEGLIGENCE CLAIM OF RELIEF

21. The Court, based upon the claims for relief presented by the plaintiffs, finds that defendant, Ford Life had no conceivable duty to plaintiffs which they could have breached. Hence, the claim for negligence must fail. *Bethea v. Escambia County*, 514 So.2d 872 (Ala. 1987).

CONSPIRACY CLAIM OF RELIEF

22. The Court finds that since no actionable wrong remains to support it, the claim for conspiracy must fail. *Betts v. Mcdonald's Corp.*, 567 So.2d 1252 (Ala. 1990).

FINAL ORDER

Upon consideration it is therefore Ordered, Adjudged, and Decreed by the Court that:

1. The Motion of the Plaintiffs for leave to Amend this Complaint filed March 11, 1993, is DENIED and the Motion of Defendant, Ford Life to Strike such Amended Complaint is GRANTED, and

2. The Motion of Defendant, Ford Life for Summary Judgment is GRANTED and

3. The Court finds that there is no just reason for the delay of this action and certifies this as a Final Order, under Alabama Rules of Civil Procedure, Rule 54(b); accordingly, this action is DISMISSED WITH PREJUDICE as to Defendant, Ford Life with costs taxed to the Plaintiffs.

Dated: 3/29/93

/s/ Ferrill D. McRae
FERRILL D. MCRAE
Circuit Judge

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Case No. 1921552

JOYCE MILLER, Administratrix for the ESTATE OF MEARL M. MILLER, Deceased; PAULA GOSS,
Appellant,

vs.

DOBBS MOBILE BAY, INC., d/b/a TREADWELL FORD, FORD LIFE INSURANCE COMPANY, *et al.*,
Appellee.

DEFENDANT/APPELLEE FORD LIFE INSURANCE COMPANY'S BRIEF IN SUPPORT OF ITS APPLICATION FOR REHEARING

INTRODUCTION

This Honorable Court's opinion regading Plaintiff/Appellant's breach of contract and bad faith claims is a cataclysmic and irreconcilable departure from established Alabama law which, unless modified, will violate: (1) the Due Process Clause of the Fourteenth Amendment, (2) the Contracts Clause of Article 1, § 10, and (3) the separation of as powers set forth in §§ 41 and 43 of the Alabama Constitution of 1901, as amended.

In its original opinion, this Court correctly affirmed the trial court's summary judgment on all claims for fraud because none of the Plaintiffs suffered a legal detriment in connection with the purchase of the credit life insurance. Also, this Court correctly affirmed the trial court's

discretionary denial of Plaintiff's request to amend the Complaint and add numerous new claims.

However, this Honorable Court, by reversing summary judgment in favor of Ford Life on Plaintiff's breach of contract claim, so egregiously strayed from established Alabama law that it, in effect, overruled fundamental principles of agency law which prohibit soliciting agents from binding insurers when the explicit and unambiguous language of the insurance application and policy expressly forbid modification or waiver without the express, written consent of the insurer. Moreover, by reversing summary judgment in favor of Ford Life on Plaintiff's breach of contract claim, this Court violated the clear and unambiguous language of § 27-14-7 *Code of Alabama* (1975) which afforded insurer's limited protection against fraudulent claims by allowing them to deny the existence of a contract when the insured made misrepresentations in the application for insurance.

To support its departure from established law, this Court was forced to manipulate a remedy, the use of which, prior to this Court's decision in the case *sub judice*, was limited to innocent insurance applicants who in no way participated in the fraud perpetrated by the soliciting agent upon the insurer. However, the undisputed evidence before this Court reveals that Mr. Miller, at the very least, committed a misdemeanor when he applied for credit life insurance and signed a Certificate of Good Health knowing that in fact, he was in bad health. Prior to the ruling *sub judice*, such an action would support, rather than belie, an insurer's denial of a claim under § 27-14-7 *Code of Alabama* (1975), and, prior to the ruling *sub judice*, such a criminal act would preclude this Court from fashioning a remedy to accommodate the wrongdoer at the expense of the innocent insurer.

After implicitly overruling a century's worth of Alabama law regarding a soliciting agent's lack of authority

to bind an insurer in contract, and after creating a heretofore unrecognized exception to § 27-14-7 *Code of Alabama* (1975) (which emasculates the statute and violates the Alabama legislature's right to legislate) the accommodating one who committed, at the very least, a misdemeanor, this Honorable Court, without even discussing the merits (or lack thereof) of Plaintiff's bad faith claim, reversed summary judgment thereon.

This Court, by implicitly overruling established Alabama common law, fashioning a new and expansive exception to § 27-14-7 *Code of Alabama* (1975), and, remanding the case for trial on Plaintiff's bad faith claim, without even acknowledging that Plaintiff's burden for presenting a *primae facie* case on her bad faith claim at the summary judgment stage was substantially more onerous than that required to present a *primae facie* case on her breach of contract claim, and, further without even counterbalancing this Court's rationale for remanding Plaintiff's bad faith claim against the substantially and undeniably adverse affect such a retrospective decision would impose upon Ford Life, so offends tradtional notions of fair play and substantial justice as to deny Ford Life Due Process of law under the Fourteenth Amendment of the United States Constitution, so denies Ford Life its freedom to contract as to violate the Contract's Clause of Article 1, § 10 of the United States Constitution, and so impedes upon the Alabama Legislature's clear and unambiguous rules and regulations regarding insurance contracts as to violate §§ 41 and 43 of the Constitution of Alabama 1901, as amended.

I. SOLICITING AGENT'S AUTHORITY TO BIND INSURER

"We disagree with the trial court's conclusion that the Ford Life representative, as a soliciting agent, could not legally bind the company." Miller at 9. This Honorable Court's ruling regarding Appellant's breach of contract claim is a serious and irreconcilable departure from es-

tablished Alabama law. Heretofore, the settled law in Alabama has been that soliciting agents do not have the authority to bind insurers in the face of explicit contractual language to the contrary [1].

In *Security Life and Trust Co. v. Galin*, 280 Ala. 325, 193 So.2d 766 (1967) this Court stated:

> "An agent whose authority is limited to soliciting insurance, delivering policies and collecting premiums has no power to change stipulations in a contract of insurance, to do so he must either be a general agent or be specifically authorized or his course of dealing to that extent have been ratified expressly or impliedly. *United Insurance Co. v. Headrick*, 275 Ala. 594, 157 So.2d 19; *Liberty National Life Insurance Co. v. Staggs*, 242 Ala. 363, 6 So.2d 432."

Id. at 768.

In *Powell v. Prudential Insurance Co.*, 45 So. 208 (1907), Claude Powell filed an application for life in-

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[1] *See, Powell v. Prudential Insurance Co. of America*, 45 So. 208 (1907); *North Carolina Mutual Life Ins. Co. v. Kerley*, 109 So. 755, 215 Ala. 100 (1926); *Globe & Rutgers Fire Ins. Co. v. Pappas*, 219 Ala. 332, 122 So. 346; *Banker's Credit Life Ins. Co. v. Ayers*, 223 Ala. 407, 137 So. 23; *Life Ins. Co. of Virginia v. Newell*, 223 Ala. 401, 137 So. 16; *City Mortgage and Discount Co. v. Palatine Ins. Co.*, 226 Ala. 179, 145 So. 490; *Tutton v. Liverpool and London and Globe Ins. Co.*, 237 Ala. 230, 186 So. 551; *First National Life Insurance Co. of America v. Rector*, 225 Ala. 116, 142 So. 392 (1932); *Jones v. Liberty National Life Ins. Co.*, 35 Ala. App. 52, 47 So. 2d 222, *aff'd* 254 Ala. 111, 47 So. 2d 227; *Jefferson Life & Casualty Co. v. Williams*, 37 Ala. App. 718, 76 So. 2d 185 (1954); *Herricks v. Mutual Life Ins. Co. of New York*, 294 Ala. 446 318 So. 2d 683 (1975); *Watson v. Prudential Ins. Co.*, 399 So. 2d 285 (Ala. 1981); *Washington National Ins. Co. v. Strickland*, 491 So. 2d 872 (1985); *Land & Associates, Inc. v. Simmons*, 562 So. 2d 140 (Ala. 1989) (cert. denied —— U.S. ——, 111 S. Ct. 1305, 113 L. Ed. 2d 240 (1991)); *Todd v. Woodmen*, 620 So. 2d 591 (Ala. 1993).

surance with Prudential. In so doing, Mr. Powell signed a good health certificate indicating that he was in good health. Powell also signed an acknowledgment that he understood the policy would not take effect until it was issued and delivered to him, with the first premium thereon paid in full, all while he remained in good health. *Powell,* at 209.

Prudential's insurance policy expressly stated that Powell's application was made a part of the contract. The policy further stated:

> "No condition, provision or privilege of this policy can be waived or modified in any case except by in endorsement hereon signed by the President, one of the Vice-Presidents, the Secretary, the Assistant Secretary or the Actuary. No agent has power in behalf of the company to make or modify this or any other contract of insurance . . . ."

Id. at 209.

Approximately one month after applying for insurance Mr. Powell became ill, and, approximately one month thereafter (two months after applying for insurance), before the insurance policy was issued or the first premium paid, Mr. Powell died. When Prudential denied a claim tendered by Mr. Powell's estate, the estate filed suit. Witnesses for Mr. Powell testified that Prudential's soliciting agent had assured them that Mr. Powell's life insurance policy would still be good even though he was sick. *Id.* at 209-210.

In rejecting the Plaintiff's claim that Prudential's soliciting agent waived the policy pre-requisite, this Court held that the insured could not be held to have been ignorant of the terms of his own policy, and, based upon the language of the policy, no agent had any right to waive them. "No conclusion can be indulged that the agent, under such circumstances had, or could have acted on, any real or supposed authority, for waiving any con-

ditions specified as ground for forfeiture." *Id.* at 211. To do otherwise, the Court held, "would be against the plainest dictates of reason and justice." *Id.* at 211.

Likewise, in *North Carolina Mutual Life Ins. Co. v. Kerley,* 109 So. 755, 215 Ala. 100 (1926), the life insurance applicant signed a "good health" statement which was a pre-condition to issuance of the policy. The applicant paid the first month's premium, and the insurer issued a policy. Subsequently, the applicant died, and the insured denied a claim on the grounds that the applicant in fact was in bad health when the policy was issued. *Id.* at 100.

The applicant's estate alleged, however, that the insurer's soliciting agent retained the first premium paid on the policy and delivered the policy with full knowledge of the fact of the applicant's poor health. The policy provided:

> "[O]nly the officers at the home office—have authority to determine whether or not a policy shall issue upon this application [which became a part of the policy], . . . no statements, promises, or information made or given by or to the person soliciting or taking this application for a policy . . . shall be binding on the company or in any manner affect its rights, unless such statements, . . . be reduced to writing and presented to the officers of the company at the home office."
>
> *North Carolina Mutual Life Ins. v. Kerley,* at 101.

In reviewing the above language of the insurance policy, the Court held the insurer could not be bound by any information its local agent was provided, if this information was not communicated in any manner to the officers of the company at the home office. *Id.* at 101.

The language in the application and insurance policy *sub judice* which prohibited the soliciting agent from in any way modifying the application or policy and/or bind-

ing Ford Life in contract is indistinguishable from that contained in *Powell, Kerley,* and the numerous cases over the past century wherein this Court has consistently held that soliciting agents do not have the authority to bind insurers in contract. Accordingly, absent a clear exception to this general principle of agency law, this Court, in reversing the trial court's summary judgment on Plaintiff's breach of contract claim, so deviated from established Alabama law as to, in effect, overrule over a century's worth of law, the existence of which, insurers, when drafting their insurance policies and applications, have greatly relied upon.

II. LIMITED EXCEPTION TO A SOLICITING AGENT'S LACK OF AUTHORITY TO BIND AN INSURER

This Honorable Court in reversing Summary Judgment in favor of Ford Life on Plaintiff's breach of contract claim, relies upon a few cases that have created what may be deemed as a "limited exception" to the law regarding soliciting agents. This Court recites this exception as: *"an insurance company cannot defend its refusal to pay benefits on grounds that the insured made a misrepresentation in the application if the misrepresentation was the fault of the agent and that fault was without participation by the insured." Miller* at 8.

A. The Facts of the Case *Sub Judice* are Distinguishable from Those in Which This Court has Applied the "Limited Exception".

To support its finding that Ford Life, because of the alleged misrepresentation of an alleged soliciting agent, cannot deny the existence of a contract, this Court cites *National Life & Accident Ins. Co. v. Allen,* 285 Ala. 551, 234 So. 2d 567 (1970). However, the preeminent distinguishing fact of *Allen* and its progeny is that the insured did not in any way participate in the misrepresentation

to the insurer. In fact, in *Allen* and every case citing this "limited exception" the soliciting agent, rather than the insured, completed the insurance application. And, in so doing, the soliciting agent either willfully failed to illicit responses to every question of the application, or fraudulently altered the applicant's truthful responses thereto. In every case, the applicant was excusably ignorant of the agent's fraud upon the insurer.

For example, in *National Life & Accident Ins. Co. v. Allen,* 285 Ala. 551, 234 So. 2d 567 (1970), the life insurance applicant was a highly unsophisticated blind man. The soliciting agent completed the entire application for the applicant, and, in doing so, falsely indicated the applicant had not been treated for any condition within the last ten years, except for his blindness. However, the applicant in fact had been suffering from cirrhosis of the liver, a peptic ulcer, a heart condition, and had been treated by a physician and hospitalized within the preceding year. *Allen* at 553. The undisputed evidence indicated that the applicant made known to the soliciting agent the extent of his physical ailments, and, further, because of his blindness and lack of sophistication, the applicant was completely unaware of the soliciting agent's failure to adequately disclose this information on the insurance application. *Id.* at 553-554.

That the Court in *Allen,* before applying the limited exception to the law that soliciting agents are prohibited from binding insurers in contract, first expressly determined that the applicant did not in any way participate in the fraud perpetrated upon the insurer, is not a coincidence or mere convenience, rather, it is a necessity, the absence of which precludes a remedy.[2]

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[2] *See for example: First National Life Insurance Co. v. Rector,* 225 Ala. 116, 142 So. 392 (1932) (Applicant was unaware that soliciting agent fraudulently failed to write down applicants disclosure regarding previous medical treatment); *American Life Insurance v. Buntyn,* 148 So. 617 (Ala. 1933) (Soliciting agent,

Unlike the innocent applicant cases wherein this Court properly applied the limited exception to the law forbidding soliciting agents from modifying insurance contracts, Mr. Miller actively participated in the misrepresentation perpetrated upon Ford Life. As this Court properly recognized in its opinion, irrespective of any oral statements allegedly made by Ford Life's alleged soliciting agent, it is undisputed that Mr. Miller read the insurance application containing a Certificate of Good Health, understood purchasing the insurance was optional (Mr. Miller later told his wife that he knew, irrespective of the alleged mistatements by the alleged Ford Life soliciting agent, that purchase of the insurance was not a mandatory) (C 1085-1086), and knew that purchasing credit life insurance while in bad health precluded payment thereon (C 1103), however, Mr. Miller still signed the good health certificate knowing that he was in fact, in bad health.

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while filling out application, fraudulently failed to record applicant's truthful response to insurer's application question regarding any prior surgical operations that insured had had his right testicle removed); *Interocean Casualty Co. v. Irvin*, 229 Ala. 312, 156 So. 844 (1934) (Soliciting agent filled out an application for accident and health insurance on behalf of a deaf and dumb applicant who could neither read nor write and fraudulently misrepresented that neither the applicant's hearing nor vision was impaired); *Commercial Casualty Insurance v. Hudgens*, 160 So. 106 (Ala. 1935) (Soliciting agent while filling out the application, fraudulently failed to record Plaintiff's truthful responses to insurer's application questions); *Coastal States Life Insurance Co. v. Leonard*, 279 Ala. 171, 182 So.2d 913 (1966) (Soliciting agent filled out application for accidental death benefits by recording applicants oral responses to the application questions, however, instead of asking applicant all the questions contained in the application, agent fraudently inserted his own answers to the questions). See also *Williamson v. New Orleans Inc.*, 84 Ala. 106 (1887); *United Security Life Insurance Co. v. St. Claire*, 130 So.2d 213 (Ala. 1961); *Alabama Farm Bureau Mutual Ins. v. Davis*, 354 So.2d 15 (Ala. Civ. App. 1978).

This Court, in compliance with its obligation to construe the evidence in a fashion most favorable to the Plaintiff, found, that, at best, "*the jury could find that the only misrepresentation made by Mr. Miller came when he signed a good health certificate.*" *Miller* at 8. Prior to this Court's ruling, such evidence would have mandated Summary Judgment in favor of Ford Life on Plaintiff's breach of contract claim.

Moreover, Mr. Miller, in signing the good health statement violated § 27-12-23 *Code of Alabama,* (1975) which states:

> § 27-12-23. False statements, etc., in insurance application.
>
> No agent, broker, solicitor, examining physician or other person shall knowingly make a false or fraudulent statement or representation in, or relative to, an application for insurance. Violations of this section shall be punishable under section 27-1-12.

§ 27-1-12 *Code of Alabama,* (1975) provides that such a misrepresentation constitutes a misdemeanor, punishable by a maximum fine of $1,000 and/or up to one year in jail.

This Honorable Court has never before extended the innocent applicant limited exception to the law regarding soliciting agents to accommodate one who, in applying for insurance, knowingly participated in the misrepresentation, and, in doing so, committed a misdemeanor.

B. The Court's Unfettered Judicial Expansion Of the "Common Law Limited Exception" to § 27-14-7 *Code of Alabama* (1975), Violates the Principle of Separation of Powers Embodied in the United States and Alabama Constitution.

§ 27-14-7 *Code of Alabama,* (1975) states in part:

"(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent;

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been make known to the insurer as require either by the application for the policy or contract or otherwise."

The Alabama Constitution of 1901, as amended, Sections 42 and 43 provide:

"Section 42. Legislative, executive and judicial departments established.

> The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another."

Section 43 provides in part:

> "Sec. 43. Separation of powers.
>
> . . . the judicial shall never exercise the legislative or executive powers, or either of them".

As this Court ably recognized in *Folsom v. Wynn*, 631 So.2d 890, 896 (Ala. 1993), "[t]he judiciary is a separate, independent, and co-equal branch of government. . . ." Judicial and legislative powers are coordinate, and neither can encroach upon the other. *Smith v. State*, 581 So.2d 497 (Ala. Crim. App. 1990); *see also Sparks v. Parker*, 368 So.2d 528, 531 (Ala. 1979) (Holding that "[w]ithin their respective spheres, each branch of government is supreme"); *Morgan County Comm'n. v. Powell*, 293 So.2d 830 (Ala. 1974) (Holding that judicial power and legislative power are coordinate, and neither can encroach upon the other); *Ex Parte Hugaley Water System*, 213 So.2d 799, 805 (Ala. 1968) (same).

When construing a statute, it is the duty of the court to ascertain the legislative intent from the language used in the enactment, and to abide thereby. *Ex Parte Rodgers*, 554 So.2d 1120 (Ala. 1989), and *East Montgomery Water, Sewer and Fire Protection Authority v. Waterworks and Sanitary Sewer of the City of Montgomery*, 474 So.2d 1088 (Ala. 1985). "Courts are supposed to interpret statutes, not to amend or repeal them under the guise of judicial interpretation." *Parker v. Hilliard*, 567 So.2d 1343 (Ala. 1990).

Before the Court's ruling in the case *sub judice*, temperate use of what can only be construed as a common

law exception to § 27-14-7 *Code of Alabama,* (1975) made sense. The exception operated as a form of *Estoppel in Pais,* which Black's Law Dictionary—(5th Ed. 1979) defines as:

> "the doctrine by which a person may be precluded by his act or conduct, or silences when it is his duty to speak, from asserting a right which he otherwise would have had. *Mitchell v. McIntee,* 15 Or. App. 85, 514 P.2d 1357, 1359.

In the hereinabove cited "limited exception" cases, both parties were innocent victims of the soliciting agent's fraud: the insurer was misled by the soliciting agent's fraudulent misrepresentations regarding the insured; the insured was completely unaware of the soliciting agent's fraudulent statements regarding his health. In such instances, where by necessity, one of two innocent parties would necessarily be harmed by the Court's ruling, it was logical to attribute any resulting harm to the insurer, despite its innocence.

However, application of this common law principle in the case *sub judice,* where it is undisputed that Mr. Miller:

> (1) was a sophisticated and experienced buyer of credit life insurance (C 1081-1082);
>
> (2) regularly purchased new vehicles, financed the purchase of these vehicles, and customarily purchased credit life insurance to secure payment of the balance owed (C 1081-1082);
>
> (3) despite the alleged misrepresentation by an alleged Ford Life soliciting agent, knew that the purchase of credit life insurance was not a mandatory prerequisite for the extension of credit (C 1085-1086); and
>
> (4) knew he was in bad health when he signed the good health certificate indicating that to the best of

his knowledge he was in good health (C 1103), so expands the scope of this common law principle as to infringe upon, and in fact, emasculate, legislative enactment of § 27-14-7 *Code of Alabama,* (1975).

In ruling herein, this Court did not limit its review of the trial Court's Order to an interpretation of § 27-14-7 *Code of Alabama,* (1975). On the contrary, this Court appears to have reached a conclusion it deems desirable and has fashioned an opinion to that end.

Despite the undisputed applicability of at least one, if not all of the alternative grounds provided by the Alabama legislature for denial of a claim on an insurance policy, this Court has ruled, notwithstanding § 27-14-7 *Code of Alabama,* (1975) that Ford Life may not deny coverage of Mr. Miller's claim. This regrettable result has, as a practical matter, brought the applicability of § 27-14-7 in any case into question, and, as such, has needlessly and unconstitutionally infringed upon the Alabama legislature's right to draft laws based upon a proper weighing of competing public policy interests. As the Court held in *Parker v. Hilliard,* 567 So. 2d 1343 (Ala. 1990), Courts are supposed to interpret statutes not amend or repeal them under the guise of judicial interpretation.

C. *Ford Life Insurance Company v. Jones,* 262 Ark. 881, 563 S.W.2d 399 (1978) does not mandate reversal of Motion for Summary Judgment on Plaintiff's bad faith claim.

To support its holding that Ford Life cannot defend its refusal to pay on the basis that its agent did not have the authority to bind it, this Court quoted extensively from *Ford Life Insurance Co. v. Jones,* 262 Ark. 881, 563 S.W.2d 399 (1978). However, the Eighth Circuit has since examined the Arkansas Supreme Court's holding in *Jones* and has clarified some of its more misleading passages.

In *Jackson v. Prudential Insurance Co.*, 736 F.2d 450 (8th Cir. 1984), Mr. Jackson's widow sued Prudential after it refused to pay death benefits pursuant to a temporary life insurance agreement. Prudential claimed that Mr. Jackson failed to disclose material information regarding the state of his health at the time he applied for the insurance. During the month prior to Mr. Jackson's meeting with Prudential's soliciting agent, Mr. Jackson had experienced shortness of breath, chest pain, and a tingling sensation and numbness in one arm during his regular evening walks with his wife. *Jackson* at 452.

Mr. Jackson was referred to a doctor by a friend who had had heart problems and a bypass surgery. Eight days before meeting with the Prudential agent, Mr. Jackson visited a doctor who performed several examinations, including a resting electrocardiogram and a stress electrocardiogram in conjunction with a treadmill tolerance test. *Jackson* at 452.

In response to Prudential's application question #19b:

> "[Have you] within the last twelve months:
>
> ". . . (b) had an electrocardiogram for chest pain or for any other physical complaint, or taken medication for high blood pressure?"

Mr. Jackson stated:

> "As it is written there it would have to be no. I have had an electrocardiogram, but it was in a routine physical."

Based on Mr. Jackson's statement, the Prudential agent answered "no" to question 19b. *Jackson* at 453.

Nevertheless, the jury, (perhaps indicative of the overwhelming prejudice of juries against Defendant insurers) found that Mr. Jackson's application contained no misrepresentations, omissions, concealment of facts, or incorrect statements. Accordingly, the Court entered a verdict and judgment in favor of Mrs. Jackson, for $42,000.00, the face amount of the insurance policy.

In reversing the Court's verdict, the Eighth Circuit examined Mrs. Jackson's contention that, because the Prudential soliciting agent knew of Mr. Jackson's heart condition (testimony was presented at trial that the soliciting agent knew many of Mr. Jackson's friends, treating physicians, was aware of Mr. Jackson's physical ailments, and further knew that Mr. Jackson had familial history of heart conditions). Despite this evidence, the Court held:

> "No one disputes, however, that [Prudential's soliciting agent] correctly recorded Mr. Jackson's answers." *Id.* at 454.
>
> * * * *
>
> "The general rule is that notice to a soliciting agent is not notice to the insurance company; a soliciting agent has no authority to waive policy requirements and his knowledge cannot be imputed to the insurer. *See e.g., Ford Life Insurance Co. v. Samples,* 277 Ark. 351, 641 S.W.2d 708, 710 (1982) . . . *Ford Life Insurance Co. v. Jones,* 262 Ark. 881, 563 S.W.2d 399, 402 (1978) . . . *Continental Insurance Co. v. Stanley,* 263 Ark. 638, 569 S.W.2d 653 (1978)." *Id.* at 454.

When Mrs. Jackson claimed that *Ford Life v. Jones* required a ruling in her favor, the Court held:

> "[T]he facts of the case [*Ford Life Insurance Co. v. Jones*] were particularly appealing because of the vagueness inherent in asserting that one is in "good health." An applicant might make such an assertion in good faith, yet have serious health problems. To accord controlling significance to such an assertion, which represents the applicants opinion of his health, obviously would be unwarranted, and the Arkansas Supreme Court declined to do so." [emphasis added] *Id.* at 455.

In the case *sub judice,* it was undisputed that Mr. Miller was in bad health at the time he signed the Cer-

tificate of Good Health and that he knew he was in bad health at that time. Accordingly, to apply the ruling in *Jones,* which as defined by *Jackson,* was intended to protect applicants who, in good faith state their opinion that they are in good health at the time they sign an application for insurance, in the case *sub judice* wherein it is undisputed that Mr. Miller knew he was in bad health at the time he signed the Certificate of Good Health, is manifestly unfair.

Finally, while this Court noted the similarities between the case *sub judice* and *Ford Life Insurance Co. v. Jones,* one important distinction between the two cases remains yet unaddressed by this Court. In *Jones,* the Arkansas Supreme Court, while affirming the jury's verdict in favor of the Plaintiff, remanded the case to the Circuit Court to lower the jury verdict (which was just slightly more than $5,000.00 to begin with). The Arkansas Supreme Court, in ruling in Jones' favor, knew the extent of Ford Life's exposure as a result of its decision, and further knew that Ford Life's exposure was for a relatively small sum. Conversely, this Court, in reversing Summary Judgment on Plaintiff's bad faith claim has exposed Ford Life to a conceivably astronomical sum of punitive damages. Although the United States Supreme Court has approved Alabama's post verdict review of jury punitive damage awards [3], such verdicts have still had a crippling affect on the insurance industry [4].

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[3] *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991).

[4] The Insurance Commissioner's Office indicates that the following insurance companies have expressly refused to sell policies in Alabama as a result of crippling punitive damages:

Aegon; Blue Ridge Insurance Company; Columbian Mutual Life Insurance Company; Fortis Benefits; John Alden Life; Life Insurance Company of Georgia; Minnesota Mutual Life Insurance Company; Northland Insurance Company; Pyramid Life Insurance Company; Southern General Insurance Company; Time Insurance Company; Vanguard Insurance Company; and Provident Indemnity.

Moreover, post-verdict reviews of punitive damage awards have been deemed adequate protection of an insurer's due process rights against excessive verdicts, not as an adequate protection of an insurer's due process rights against being exposed to the cost of defending a bad faith claim, bought against because of the insurer's reliance upon established law when refusing to pay a claim.

III. RETROACTIVE INTERPRETATION OF THE INSURANCE APPLICATION, CONTRARY TO ITS CLEAR AND UNAMBIGUOUS TERMS, VIOLATES FORD LIFE'S FREEDOM TO CONTRACT.

In *Browning-Ferris v. Kelco Disposal,* 492 U.S. 257, 106 L.Ed.2d 219, 109 S.Ct. 2909 (1989), the United States Supreme Court held the Federal Constitution's Eighth Amendment which includes a prohibition against excessive fines, does not apply to awards of punitive damages in cases between private parties, and, in *Pacific Mutual Life Insurance Company v. Haslip,* 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991), the United States Supreme Court held that Alabama punitive damage awards against insurers are not *per se* violations of the Fourteenth Amendment's Due Process clause in light of the extensive post verdict reviews conducted by the trial and appellate court. However, in *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580 (1986) the United States Supreme Court stated:

> "Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the contracts clause of Article I, Section 10 . . . [t]hese arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the

recusal-for-bias issue makes it unnecessary to reach them." *Aetna* at 837.

In *Aetna,* the United States Supreme Court readily recognized that a Court's judicial activism in creating a cause of action for punitive damages as a result of a contract in which the parties freely entered, and retroactively applying it to the contract before the Court could violate the guaranteed rights, of the Contracts Clause. This is such a case.

IV. FORD LIFE SHOULD NOT BE EXPOSED TO PLAINTIFF'S CLAIM FOR BAD FAITH AS A RESULT OF ITS FAILURE TO FORESEE THIS COURT'S DRAMATIC CHANGE OF AGENCY LAW.

This Court has greatly vacillated in its determination of what constitutes a *prima facie* case of bad faith (see *Auto-Owners Insurance Co. v. Ogden,* Ala. S.Ct. 1930368, 1995 Ala. LEXIS 70, —— So.2d —— (1995) (Maddox, J. dissenting)). However, it is undisputed that the elements of bad faith refusal to pay are:

> "(a) an insurance contract between the parties and a breach thereof by the Defendants;
>
> (b) an intentional refusal to pay the insured's claim;
>
> (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> (e) if the intentional failure to determine the existence of a lawful basis is relied upon, the Plaintiff must prove the insurers intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."

Gillion v. Alabama Forestry Ass'n., 597 So.2d 1315, 1321 (Ala. 1992) *citing Independent Life and Accident Insurance Co. v. Parker*, 449 So.2d 233 (Ala. 1984).

"If any one of the reasons for denial of coverage is at least 'arguable,' this Court need not look any further." *Gillion* citing *McLaughlin v. Alabama Farm Bureau Mut. Cas. Insurance Co.*, 437 So.2d 86, 91 (Ala. 1983).

"Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose in means of breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will. *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So.2d 916 (Ala. 1981).

> "We are satisfied that the application of the test formulated above, which recognizes the intentional nature of the tort of bad faith and puts the test upon an objective basis, will minimize the fears expressed by the Defendant insurance company that to permit claims for bad faith would result in extortionate lawsuits. Such result cannot follow when an insurance company in the exercise of ordinary care makes an investigation of the facts and law and concludes on a reasonable basis that the claim is at least debatable." *Barnes* at 924 adopting *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 693, 271 N.W.2d 368, 377 (1978).

It is undisputed that Ford Life investigated Plaintiff's claim, and in the course of that investigation found that decedent, contrary to his Certificate of Good Health, was in very bad health at the time he applied for insurance. It is further undisputed that, prior to this Court's decision, insurers could invoke § 27-14-7 *Code of Alabama*, (1975) as a defense to a claim upon a showing that the insured made material misrepresentation in his insurance application. Such factors clearly indicate a "debatable reason" for denying Plaintiff's claim.

Accordingly, reversal of summary judgment on Plaintiff's breach of contract claim appears to be premised upon this Court's departure from established Alabama law in the case *sub judice*, as such, it is inconceivable how Ford Life may now be deemed liable for punitive damages for actions which, at the time they were committed, were well within the parameters of acceptable conduct under Alabama law.

In *Jackson v. Fillmore*, 367 So.2d 948 (Ala. 1979) this Court aptly stated:

> "Persons contracting are presumed to know the existing law, but neither they nor their legal advisors are expected to know the law better than the Courts, or to know what the law will be at some future date. Any principle or rule which deprives the person of property acquired by him, or the benefit of a contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the Court of last resort at the time of the transaction, and no fault can be imputed to him in the matter of the contract, unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong." *Id.* at 951 (quoting *Farriar v. New England Mortgage Security Co.*, 9 So. 532, 532-33 (Ala. 1891).

See also Department of Revenue v. Morrison's Cafeterias Consolidated, Inc., 487 So.2d 898, 903 (Ala. 1986) ("[W]here parties have acted upon the law as clearly declared by judicial decision, they will be protected, although such decisions are thereafter overruled.")

Accordingly, Ford Life should not be exposed to Plaintiff's bad faith claim solely for failing to anticipate this Court's unforeseeable decision.

V. RETROACTIVELY IMPUTING KNOWLEDGE OF THIS COURT'S UNFORSEEABLE DECISION WHICH EXPOSES FORD LIFE TO PUNITIVE DAMAGES, VIOLATES FORD LIFE'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT

This Honorable Court may, within the boundaries of the United States and Alabama Constitutions, modify or overrule Alabama common law as it deems appropriate. However, in this case, by reversing summary judgment on Plaintiff's bad faith claim only after implicitly overruling established legal limitations placed upon soliciting agents, and after denying Ford Life the right to avail itself of a statute designed to protect it against fraudulent claims, this Court, in effect, retroactively imputed to Ford Life knowledge of this unforeseeable ruling back to the time it denied Central Bank's claim on Plaintiff's policy, and as a consequence, exposed Ford Life to punitive damages for failing to foresee or in any way anticipate this Court's decision.

As stated hereinabove in *Jackson v. Fillmore*, such a conclusion is contrary to Alabama public policy. Moreover, such a conclusion denies Ford Life its rights to due process under the Fourteenth Amendment.

A corporation is a "person" within the meaning of the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676, 470 U.S. 869 84 L.Ed.2d 751 (re-hearing denied) 105 S.C. 2370, 471 U.S. 1120, 86 L.Ed.2d 269, on remand *Ex Parte Ward* 479 So.2d 41.

Due process requires that a State provide meaningful standards to guide the application of its laws. *Kolender v. Lawson*, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

"The right to due process is guaranteed to the citizens of Alabama under the Alabama Constitution of 1901, Article I, Sections 6 and 13. This Constitutional right

to due process applies in civil actions as well as criminal proceedings." *Pike v. Southern Bell Telephone and Telegraph Co.*, 263 Ala. 59, 81 So. 2d 254 (1955).

"As the Supreme Court has repeatedly made clear, the content of due process is not limited to the specific provisions of the Bill of Rights. Nor is due process confined to criminal prosecutions; it applies to any legal proceeding or regimen by which any person may be deprived of 'life, liberty, or property.' Due process requires, in whatever context, that legal procedures be consistent with 'fundamental fairness'; that they be consonant with 'ordinary notions of fair play and the settled rules of law'; that they accord with 'traditional notions of fair play and substantial justices'; and that they not offend 'the community's sense of fair play and decency.' However, phrased, the message is clear: due process mandates at all times, in all circumstances, and for all defendants, 'fundamental fairness' at the hands of the law." J. Jeffries, *A. Comment on the Constitutionality of Punitive Damages*, 72 Va.L. Rev. 139, 151-52 (1986).

Punitive damages are imposed for purposes of retribution and deterrence *Aetna Life Ins. Co. v. Lavoie*, 740 So. 2d 1060, 1076 (Ala. 1984). They are also frequently described as quasi-criminal. *See for example Smith v. Wade*, 461 U.S. 30, 59, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983) (Rehnquist, J., dissenting).

Although the *Ex Post Facto Clause* is a limitation upon the powers of the Legislature not the Judiciary *Frank v. Mangum*, 237 U.S. 309, 344, 59 L. Ed. 969, 35 S. Ct. 582 (1915), the principle upon which the clause is based, the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties, is fundamental to our concept of constitutional liberty. *U.S. v. Harriss*, 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954).

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely

> like an ex-post facto law, such as Art. I, Sec. 10, of the Constitution forbids. . . If a State legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Law from achieving precisely same the result by judicial construction."

Bouie v. City of Columbia, 378 U.S. 347, 353-354, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

> "The *ex post facto* principle applies to any activity in which a person engages with a reason to believe that it does not give rise to a particular penalty. This additional protection comes not from the *ex post facto* constitutional prohibition itself but from the 'due process' clause of the Fifth Amendment, which incorporates the same concept for judicial interpretations and holds that they rise to the level of a guarantee."

Marks v. U.S., 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). See also *U.S. v. Hayes*, 703 F. Supp. 1493, 1502 (N. Dist. of Ala. 1989). Cf. Ala. Constitution 1901, Art. I, §§ 6, 7, and 13.

Although prohibition against *ex post facto* laws generally applies only to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties. *Valley Wood Preserving, Inc. v. Paul*, 785 F.2d 751, 754 (9th Cir. 1986); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985). Accordingly, some courts of appeals and the United States Supreme Court have recognized that retroactive application of new punitive damages presents a potential *ex post facto* problem. *Louis Vuitton*, 765 F.2d at 976; *see also Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf*, the Supreme Court noted that "[t]he very labels give 'punitive' or exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanc-

tions. Retroactive imposition of punitive damages would raise a serious constitutional question." *Id.* at 1490.

The United States Supreme Court has recognized that *prospective* application of a judicial decision is sometimes necessary to avoid injustice or hardship. *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2505 (1993). Accordingly, the court has established a standard for determining whether a judicial decision should be retroactive or prospective. *Chevron Oil v. Huson*, 404 U.S. 97 (1971). When deciding whether a decision should be retroactive or prospective, a Court must consider the following three facts:

(1) the decision must announce a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression the resolution of which was not clearly foreshadowed;

(2) the application of the old rule in the instant case must not controvene the purpose and operation of the provision being interpreted; and

(3) application of the new rule in the instant case must be inequitable. *McKinney v. Pate*, 20 F.3d 1550, 1565 (11th Cir. 1994).

At the very least, this Court, before reversing Summary Judgment on Plaintiff's bad faith claim, should have conducted a balancing test in compliance with *Chevron Oil.*

CONCLUSION

In reversing the trial Court's Summary Judgment on Plaintiff's breach of contract and bad faith claims, this Court overruled the established Alabama Law and ignored a clear and unambiguous statute § 27-14-7 *Code of Alabama*, (1975) to reach what this Court considered to be a fair decision.

In so doing, the Court violated the principle of separation of powers as set forth in Sections 42 and 43 of the

Alabama Constitution 1901, as amended, denied Ford Life freedom of contract as guaranteed in the Contract Clause, Article 1, Section 10 of the United States Constitution, and, most importantly, denied Ford Life due process as guaranteed under the Fourteenth Amendment of the United States Constitution.

Accordingly, this Honorable Court should reconsider its decision as regards Plaintiff's breach of contract and bad faith claims, and affirm the trial Court's Summary Judgment hereon.

ORAL ARGUMENT REQUESTED

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APPENDIX E

A SURVEY OF ALABAMA PUNITIVE DAMAGES 1981-1994 *

1994

(Non-Wrongful Death)

Willie Ed Johnson v. Mercury Finance Co. 50,000,000

Lender. Suppression. Buyer of used car alleged the defendant fraudulently failed to disclose a $1,000 discount for which defendant purchased non-recourse note, alleging it was a finance charge. Additional compensatory award of $90,000. One-day trial. CV-93-52 (Barbour [Clayton] County, August 5, 1994). Remitted to $2 million pursuant to settlement agreement.

Davis v. Associates Financial Services Co. 33,000,000

Lender. Plaintiff alleged that defendant, without her knowledge or permission, forged her signature as co-obligor on a loan the defendant made to plaintiff's ex-husband. Ex husband defaulted on loan, plaintiff was dunned for two months' payments. Compensatory verdict $1.5 million. CV-93-38 (Lowndes County, March 11, 1994). Motion for new trial granted.

Gallant v. Prudential Ins. Co. and Charlie Whatley 25,000,000

Insurance. Agent fraud. Plaintiffs alleged that insurance agent misled policy holders during sales presentation regarding their policies. Alleged pattern or practice. Actual damages approx. $600. No remittitur. Trial

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* This survey was conducted by the law firm of Pierce, Carr, Alford, Ledyard & Latta, P.C., and has been included in the Appendices of a number of recent requests for Writ of Certiorari. This survey most recently appeared in the Brief of the Business Council of Alabama as Amicus Curiae in support of Petitioner in *BMW of North America, Inc. v. Gore*, 94-896, March 23, 1995.

judge directed part of award be paid to State. CV-93-50 (Barbour [Eufaula] County, April 6, 1994). Settled pending appeal.

Bowman et al. v. Hobart Corporation 22,750,000

Product Liability. Plaintiff butcher at Delchamps cut his hand on slant saw which he claimed was defective. Medicals of $12,000. Plaintiff showed Hobart had made inconsistent and/or incomplete responses to discovery about similar incidents in other cases. Compensatory damages $654,784. CV-91-0811-FDM (Mobile County, May 25, 1994). Settled post-trial.

Johnson v. Life Ins. Co. of Georgia, Inc. 15,000,000

Insurance. Agent fraud. Plaintiff alleged defendant sold an unneeded Medicare Supplement policy. Evidence of pattern or practice. Jury awarded $1 million punitive damages, $250,000 compensatory damages. CV-93-0969-BLK (Mobile County, June 2, 1994). Appeal pending.

Chandler v. Union Carbide Chemicals 14,750,000

Environmental. Fraud. Alleged contamination of neighboring property by leakage from chemical storage ponds. Plaintiffs alleged fraud/deceipt by defendant regarding the chemicals and their migration. Jury awarded $15,175,000 which included compensatory damages of $425,000. CV-92-2363-DIJ (Mobile County, October 7, 1994). Post-trial motions pending.

Sperau et al. v. Ford Motor Co. 6,000,000

Business tort. Dealer termination. Two owners of car dealership alleged that Ford fraudulently promised to help them stay in business with a high rate of return. Instead they allegedly were forced into bankruptcy. Compensatory damages of $4,492,000, which included $3.5 million in mental anguish. Mental anguish remitted to $200,000

and $500,000 by the trial court. CV-91-34 (Lowndes County, February 24, 1994). Appeal pending.

Whittington et al. v. Waste Management of Alabama 5,000,000

Environmental. Alleged contamination of plaintiffs' property next to facility where portable toilets and old garbage containers were stored. Compensatory damages $86,000. CV-93-77-RTC (Mobile County, April 8, 1994) Post-trial motion pending.

Crocker v. Union Security Insurance Co. 5,000,000

Insurance. Agent fraud. Defendant denied a widow's claim under credit life insurance policy due to misrepresentation of medical history in application form. Plaintiff alleged the agent knew of the condition when the application was taken. Breach of contract claim dismissed. Actual damages of $14,000. CV-92-064 (Choctaw County, February 17, 1994). Appeal pending.

Carrier Express Inc. v. Home Indemnity Co. 4,812,500

Insurance. Bad faith. Refusal of insurer to tender policy limits to settle tort claim with potential excess liability, after all other insurers had tendered limits. Compensatory damages award of $2,463,959. Case No. 91-G-1072-S (U.S.D.C. Northern District of Alabama, January 28, 1994).

Coram v. Liberty National Life Ins. Co. 4,500,000

Insurance. Agent fraud. Agent of insurer allegedly defrauded an existing policyholder into replacing some existing policies with other policies which offered less coverage. Compensatory award of $100,000. CV-93-2100-DIJ (Mobile County, November 17, 1994). Appeal pending.

Fenn v. Liberty Life Ins. Co. 2,500,000

Insurance. Wanton supervision and training. Independent agent of insurer allegedly misrepresented the cash value and future interest rate on a universal life policy. Agent paid $1 million settlement before trial. CV-93-49 (Barbour [Clayton] County, August 3, 1994).

Cooper & Associates v. Central Life Assur Co. 2,200,000

Employment contract. New trial after original $2M verdict was remitted on appeal to $300,000 [614 So.2d 982]. Agents sued insurance company alleging fraud and breach of contract causing lost commissions. Compensatory damages award of $101,000 for lost commissions. CV-87-503-168-MC (Jefferson County, June 30, 1992). Settled post-trial.

Simmons v. Safeco Insurance Co. 2,000,000

Insurance. Bad Faith. Homeowners claim was denied by insurer on grounds of arson. Total verdict of $2,271,720 included $125,000 for mental anguish. 93-0704-RV-S (U.S.D.C. Southern District of Alabama, November 7, 1994).

Willie Collins v. Griffin Wheel Co. 1,000,000

Wrongful termination. Plaintiff claimed he was wrongly terminated from job when he asked for workers compensation payments during a plant shutdown. Employer said he was fired because he failed to return to work after the shutdown. Total verdict of $1.55 million consisted of $550,000 in compensatory damages. CV-89-319 AHV (Jefferson County, August 11, 1994).

Robert Rawlinson v. Allstate Ins. Co. and Fred Quinn 976,000

Insurance. Alleged fraud involving plaintiff's purchase of boat owner's policy on used houseboat. No mental

anguish claim. Compensatory damages of $24,000. CV-93-25AA (St. Clair County, Jan. 28, 1994).

Ruffin v. Alabama Empire Knights of KKK 900,000

Trespass. Hate crime. Defendants (members of KKK) placed a burning cross in plaintiff's yard seeking to force him out of all white community. CV-92-PT-2322-M (Jefferson County, January, 1994).

Allen v. Statesman National Life Ins. Co. 750,000

Insurance. Agent. Total verdict $1.325 million. Application for health insurance did not disclose prior alohol history. Later revealed that agent was aware of alcohol condition at time of the application, and company attempted to pay claim. CV-93-196 (Houston County, June 23, 1994).

Arvan v. Birmingham-Jefferson County Transit Auth. 400,000

Employment contract. Former employee claimed wrongful termination after being fired for blowing whistle on bidding irregularities and waste. Total verdict of $1.08 million included $685,000 in compensatory damages. CV-93-5960-AJH (Jefferson County. September 30, 1994).

Robert E. Rone, et al. v. Hillcrest Center, Inc. et al. 200,000

Real estate. Lessor (beauty shop) of office space in to-be-built office building allegedly was promised 30 parking spaces for his clients and employees, despite language in lease agreement. Sued for rescission and fraud, after building was constructed with less than adequate parking. Compensatory damages $45,000. Punitive damages remitted to $175,000. CV-93-1021-DIJ (Mobile County, March 1, 1994). Appeal pending.

Johnson v. Ashford 175,000

Insurance. Claim by plaintiff (a former employee of Jeffco Health Dept) against a former co-employee involving a letter by defendant which allegedly contained libelous statement. Total verdict 200,000 which included 25,000 compensatory. CV-93-9347-TH (Jefferson County, October 7, 1994).

Malvina Holloway v. Harco Drugs 150,000

Pharmacist. Plaintiff was prescribed medication after surgery in effort to prevent cancer from re-occurring and Harco misfilled the prescription. Jury awarded $105,000 in compensatory damages. CV-82-004060-C (Mobile County, January 11, 1994). Appeal pending.

Westry v. Coastal Ford et al. 150,000

Automobile sales. Salesman said used car had never been wrecked or damaged and was in perfect condition; it wasn't. Consequently damages of $7,000. CV-93-0409-DIJ (Mobile County, Feb. 7, 1994).

Terry Wayne Smith v. David Palmer 125,000

Motor vehicle. Rear-end collision involving alleged drunk driver. Compensatory damages $35,000. CV-93-134-J (Shelby County, August 5, 1994).

1994

(Wrongful Death)

Clark v. Performance Toyota, Inc. et al. 10,000,000

Motor vehicle. Employee of auto detailing company was returning a car to the owner (dealership) at time of head-on collision, both drivers killed. Verdict against car dealer based upon alleged agency or joint venture between dealer and auto detailing company. No remittitur by trial court. CV-92-2437-BLK (Mobile County, April 20, 1994). Appeal pending.

Ada Peters, Admin. v. Rast Construction, Inc. 2,250,000

Construction. Issue whether plaintiff's decedent was an employee of the defendant or an independent contractor. Although the jury determined the deceased was not an employee, they found defendant negligent for not providing a safe environment for the subcontractor. CV-91-5603 -WAJ (Jefferson County, August 24, 1994).

Wassman v. Mobile Co. Communications District 1,000,000

Municipal liability. Mother phoned "911," got no answer, when her 11-year-old quadriplegic son was unable to breathe on ventilator and went into cardiac arrest. When paramedics arrived, it was too late. CV-92-4399-EBM (Mobile County, June 15, 1994).

1993

(Non-Wrongful Death)

Hoots et al. v. Duck Head Apparel Co. $19,500,000

Employment contract. Three former Duck Head salesmen sued for fraud and breach of contract alleging they were defrauded of vested sales commissions. Total verdict exceeded $29 million including $7 million for mental anguish. Punitive damages reduced to $15M after Hammond/Green Oil hearing. CV-92-561-PP (Montgomery County, November 24, 1993). Affirmed punitive damages verdict on appeal, with remittitur of mental anguish claims to $4 million, 1995 WL 64270 (Ala. 1955).

Williamson v. American Pioneer Life Ins. Co. 3,000,000

Employment contract. Sales agent alleged fraud and breach of contract based upon employer's failure to pay vested commissions on renewal premiums for contracts already written. Alleged pattern and practice of fraudulent conduct. Jury awarded $250,000 in compensatory damages. CV-89-9560-W (Jefferson Co. Apr. 12, 1993).

Britton v. AAA Plumbing Pottery Corp. 2,000,000

Workers comp. After paying substantial workers comp claims, employer and insurer were sued again by claimant for fraudulently inducing him to return to work. Defendant gave him a light duty job. Two years later plaintiff sued for fraud, claiming he had reinjured his back upon returning to work due to the employer's fraudulent inducement. Compensatory damages of $1,260,000. CV-91-4470 (Jefferson Co. Oct. 9, 1993).

Smith v. Crown Life Insurance Co. et al. 2,000,000

Insurance. Convention/fraud. Alleged conversion by agent and insurer of premium payments on policies that were already cancelled. Total verdict $4 million. Compensatory damages of $2 million were remitted by trial court to $250,000. CV-91-2083-RGK (Mobile County, May 6, 1993). Affirmed, 1994 WL 407246 (Ala. 1994).

Neuropsychiatry Assoc. v. Southeast Health Plan 1,500,000

Business tort. Fraud/Breach of Contract. Plaintiff claimed the defendant had led it to believe it would be awarded a subcontract, thereby inducing plaintiff to provide confidential information to the defendant. Punitive damages remitted by trial court to $650,000. CV-92-1742-PH (Montgomery County August 20, 1993).

Fairhope Yacht Club, Inc. v. Dyna-Span Corporation 1,400,000

Insurance. Breach of contract and fraud by insurer for failure to defend/indemnify yacht club for $400,000 personal injury claim. Verdict of $1.4 million dollars included $400,000 compensatory damages. CV-90-111-PB (Baldwin Co. Oct. 21, 1993).

McAllister v. Liberty National Life Ins. Co. 1,000,000

Insurance. Agent fraud. New cancer policy, with higher premium, did not provide better coverage than plaintiff's old policy, contrary to the agent's alleged representations. Compensatory damages $1,000. CV-92-4085-RLB (Mobile County October 12, 1993). Affirmed on appeal, —— So.2d (Ala. 1995).

Dempsey v. Mead Control Board, Inc. 1,000,000

Motor vehicles. Truck. Logger was independent contractor loading logs on the premises of Mead; logs fell, causing plaintiff's injury. Plaintiff sued Mead. Compensatory verdict of $500,000. CV-91-0026-J (Russell County, March 26, 1993). Affirmed, 644 So.2d 872 (Ala. 1994).

Brownlee v. Allstate Ins. Co. et al. 750,000

Motor vehicles. Vehicle passenger brought UM claim against wrong-way drunk driver. Concussion/lambosacral injuries. Compensatory damages of $3,500. CV92-467 and CV91-676 (Montgomery County, January 1993).

Ogden v. Auto Owners Insurance Co. 500,000

Insurance. Bad faith. Insurer denied fire loss claim based upon investigation reports by State Fire Marshal and others indicating set fire. Policy limits of $25,000 contents, $5,000 living expenses. The blaze killed one of plaintiff's teenage sons. Compensatory damages of $80,000. CV-91-3779-H (Jefferson Co. Oct. 4, 1993). Affirmed on appeal, So.2d (Ala. 1995).

Crowley v. Heil Company 500,000

Retaliatory discharge. After workers comp claim, plaintiff was reinjured and employer began taking disciplinary action against him. He later was fired and filed suit, claiming the disciplinary actions were a pretext. Compen-

satory damages of $50,000 in lost wages. CV-92-232 (DeKalb County, October 6, 1993).

Baker v. Pi Kappa Phi Fraternity 500,000

Fraternity. Assault and battery of college student punched in face by "bouncer" at fraternity party. Broken jaw. Compensatory damages of $135,000. CV-92-682-RTC (Mobile County, Dec. 14, 1993). Appeal pending.

Crumpton v. UNISCO Corp. 400,000

Securities fraud. Defendant sold a partnership in exchange for medical equipment which was not registered with the State. Compensatory damages $260,000. CV-92-0031-M (Dallas County, September 20, 1993). Not appealed.

Roman v. Kappa Alpha Psi National, etc. 300,000

Fraternity. Assault and battery action by plaintiff who claimed he was illegally hazed during initiation. Medical under $2,000. Compensatory damages of $200,000. CV-91-242 (Lauderdale County, June 15, 1993). Not appealed.

Stephens Enterprise v. Affiliated FM Ins. Co. 250,000

Insurance. Alleged bad faith failure to pay property damage claim for damage to roof. Mortgagee was inadvertently left off settlement drafts. Compensatory $200,000 has been paid, punitive verdict appealed. CV-91-0041 (Jefferson County, June 10, 1993). Affirmed, 641 So.2d 394 (Ala. 1994).

Buie v. American Financial Life Ins. Co. 200,000

Insurance. Verdict for bad faith against Southeast Marketing Corporation only. American Financial was dismissed. CV-91-0102 (Jackson County, September 9, 1993).

Franklin v. Protective Industrial Ins. Co. 175,000

Insurance. Fraud. Plaintiff brought $2,000 life insurance policy on daughter who died of cancer. Defendant alleged no claim was submitted, and material medical history was omitted on the application. Compensatory damages of $50,000. CV-93-0118-RTC (Mobile County, Oct. 5, 1993). Settled after trial.

Velarde v. Sealing Equipment Products Co. 160,552

Employment contract. Plaintiff alleged fraud and breach of contract against former employer for violating commission agreement and territory agreement resulting in lost commissions of $31,000, which the jury awarded in compensatory damages. CV-90-7718-C (Jefferson Co. June 28, 1993). 644 So.2d 904 (Ala. 1994).

Salter v. George Poindexter, et al. 150,000

Premises liability. Plaintiff was pumping gas at gas station when child in front seat of another car shifted into drive, causing that vehicle to roll forward colliding with gas pump, which caught fire injuring plaintiff. Compensatory damages of $500,000. CV92-3170-EBM (Mobile County, Apr. 19, 1993).

Dungan v. Jonathan Sack M.D., et al. 150,000

Medical liability. Sponge left in patient after surgery. Verdict of $157,000 compensatory damages, $150,000 punitive. CV-91-157-M (Russell County, January 13, 1993). Not appealed.

Mikell v. Phoenix International Marketing Corp. 110,400

Weight loss. Plaintiff sued defendant for fraud and misrepresentation of weight control food. Compensatory damages $1,300. CV-92-03-B (Autauga County, August 18, 1993). Not appealed.

Bagley, et al. v. J. P. King Auction Co. 108,000

Real estate. Purchasers sued auctioneer and real estate developer for misrepresentation involving description and value of Baldwin County vacation home lots, which were found to be wetlands. They wanted to be near the water, not in the water. In addition, the jury awarded compensatory damages of $23,000 to each plaintiff. CV-92-371-RELK (Mobile Co. March 11, 1993).

Lyles v. Southern Life & Health Co. 103,000

Insurance. Agent fraud. Plaintiff alleged cleansheeting by agent after insurer denied $4,000 life insurance claim on grounds of insured's failure to disclose material medical history. Plaintiff claims the agent was advised of the condition and assured them the application was properly completed. Compensatory damages $4,940 CV-92-3412-EBM (Mobile Co. December 1, 1993).

McCalpin v. Dr. Edward Santiago et al. 100,000

Medical liability. Plaintiff sued OB-GYN due to problems incurred during child delivery. Compensatory damages $150,000. CV-91-205-J. (Franklin County, March 17, 1993). Not appealed.

DeBardeleben v. DeBardeleben 100,000

Defamation. Ex-spouse also sued for malicious prosecution, false imprisonment, and abuse of process. Compensatory damages $40,000. CV-92-1544-PR (Montgomery County, October 29, 1993). No appeal.

1993

(Wrongful Death)

West v. Montrose Bay Heathcare Center 65,000,000

Nursing home. Patient developed massive bed sores due to alleged neglect by nursing home personnel. Sores became infected and caused blood poisoning. Defense

verdict for co-defendant doctors. Plaintiff's counsel asked for $50 million punitive. CV 91-617 (Baldwin Co. Nov. 19, 1993). Settled post-trial.

Gillam v. FMC Corp. and Bolens Corp. 25,300,000

Product liability. Decedent drowned when tractor rolled over on hill and pinned him underwater in adjacent pond. Tractor not equipped with rollover protective system which allegedly would have held decedent's head out of water. Remitted by trial judge to $12.5 million. CV-90-2723-FDM (Mobile County, May 1, 1993).

Smith v. William J. Schulte, M.D., et al. 4,500,000

Medical liability. Decedent was intubated by physician several days after severe auto accident in order to diagnose and treat respiratory complications. Lung was punctured during intubation causing oxygen deprivation, coma and death CV-90 1334-DIJ (Mobile County, April 6, 1993).

Campbell v. Williams 4,000,000

Medical liability. Alleged failure to intubate burn patient, leading to respiratory failure, coma and death. Alleged alteration of medical records to conceal facts. (Etowah County, 1993). Affirmed on appeal, rejecting constitutional challenge to non apportionment of punitive damages, 1994 WL 46867 (Ala. 1994).

Wheeler etc. v. Lemond Contracting Company 3,500,000

Premises liability. Decedent's vehicle, fleeing from police at a high rate of speed, entered a construction site, not well marked, and hit a tree. CV-92-145-S (Chambers County, November 15, 1993).

City of Birmingham v. Benson 1,600,000

Municipal liability. Off-duty police officer acting as a security guard at "Gene's Jukebox" bar, allegedly anticipated but failed to prevent altercation that resulted in minor's death. Plaintiff alleged officer was acting within scope as agent, servant or employee of city. CV-90-9896 (Jefferson County). Affirmed on appeal, 1993 WL 527291 (1993).

Trippe v. Baptist Montclair Medical Center 1,100,000

Medical liability. Woman with suicidal tendencies checked into psychiatric ward, where hospital removed her clothes and gave her a hospital gown. Later when the patient was alone, she removed a small pistol from a "body cavity" and killed herself. Jury found the hospital was negligent. CV-90-9805 (Jefferson Co. Feb. 10, 1993). Reversed on appeal, —— So.2d —— (Ala. 1994).

Estate of Segars v. Sweeny & Montgomery Rehab Hosp. 1,000,000

Medical liability. Failure to diagnose thrombophlebitis resulting in death of 42-year-old mother of two. CV92-1894 (Montgomery County, December 6, 1993).

Foster v. Avon Avalon, Inc. 800,000

Premises liability. Suit against landlord for death of two persons from carbon monoxide poisoning allegedly caused by space heater in rental property. Two $400,000 verdicts. CV-92-0460-R (Montgomery County, July 1993). Affirmed, 1994 WL 169989 (Ala. 1994).

1992

(Non-Wrongful Death)

Cain v. Armstrong World Industries, Inc. $32,200,000

Product liability. Thirteen plaintiff claims consolidated for trial. Judgment against two asbestos manufacturers (Keene Corp. and Owens-Illinois) whose products were used at Mobile Shipyards. Compensatory damages ranging from $50,000 to $900,000. New trial ordered, 785 F. Supp. 1448 (S.D. Ala. 1992).

Cole v. Southern Valley Trust, et al. 25,000,000

Insurance. Agent fraud. (Default) Agent sold product as medical insurance policy which was actually an unfunded trust. Plaintiff had radical mastectomy and insurer failed to pay for breast reconstruction and dropped her coverage. Compensatory damages $1 million. CV-90-2573 (U.S.D.C. N.D. Ala., March 2, 1992).

Enstar Group v. Richarde Grassgreen 18,000,000

Shareholder suit. Officer used company assets to purchase junk bonds from Michael Milken in return for secret kickbacks. Total verdict of $20 million. Punitive award reduced by trial court to $10 million after defendant forfeited his income for five years. CV-90-2234 (U.S.D.C. M.D. Ala., April 8, 1992).

Harrington v. Independent Life and Accident 6,230,000

Insurance. Fraud. Insurer continued to collect premiums on policy ten years after plaintiff became eligible for medicare, at which time policy had expired. CV-91-113 (Marion County, December 12, 1992). Affirmed on appeal, with remittitur to $4.23 million. 1994 WL 407246 (Ala. 1994).

Richards v. Michelin Tire Corporation 5,000,000

Product liability. Plaintiffs claimed defendant failed to warn not to mount and inflate a 16 inch tire on 16½

wheel. Jury verdict of $5 million punitive damages and $161,475 in compensatory damages. 786 F. Supp. 959 (U.S.D.C. S.D. Ala., 1992). Reserved, 21 F3d 1048 (11th Cir. 1994).

Blakely Corp. et al. v. Murphy Oil Co. USA, Inc. 4,600,000

Business/Environmental. Breach of contract and trespass involving environmental pollution of land on Blakely Island where fuel was stored. Total verdict of $8 million. CA-89-0767-B (U.S.D.C. S.D. Ala. 1992). Punitive damages remitted to $2 million by trial court. Affirmed without opinion by Eleventh Circuit. Settled for undisclosed amount.

Gore v. BMW of North America 4,000,000

Automobile sales. Defendants sold as "new" a car on which paint damages had been repaired and not disclosed to buyer. Compensatory damages $4,000. Punitive damages $4 million, based upon similar sales to 1,000 other buyers. CV-90-9658 (Jefferson Co., June 8, 1992). Affirmed on appeal, with remittitur to $2 million. 1993 WL 462033 (Ala. 1993).

Callaway v. Life & Health Ins. Co. 3,000,000

Insurance. Fraud. Verdicts against health insurer totalled $6 million for alleged fraud. CV-89-0052 (Crenshaw County, March 13, 1992). Settled post-trial.

Cope v. United Ins. Co. of America 3,000,000

Insurance. Bad faith. Refusal to pay/investigate $160 claim under cancer policy. Total verdict of $4 million. CV-90-73 (Bullock County, November 13, 1992). Reversed and remanded, 1993 WL 396058 (1993).

Benedot, Inc. et al. v. Benetton, S.p.a, et al. 2,500,000

Business tort. Suit by Benetton outlets against manufacturer for fraud and breach of contract involving shipments of merchandise which failed to conform with contracts and representations. Defendants counterclaimed for unpaid merchandise and recovered $1.25 million compensatory damages. Plaintiffs awarded $2.5 million in punitive damages. CV-89 2765 M (Jefferson County, October 19, 1992). Affirmed, 642 So.2d 394 (Ala. 1994).

Hobdy v. Chrysler First Financial Services, Inc. 2,500,000

Lender liability. Fraud, forgery and outrageous conduct arising out of loan for home improvement repairs to Hobdy's home. Compensatory award of $1,500,000. CV-91-023 (Barbour County, 1992).

Carter v. Bituminous Casualty Corp. 2,500,000

Insurance. Bad Faith. Dispute over proper loading of log truck and policy exclusions in commercial insurance policy. CV-90-222 (Marion County, December 12, 1992).

Harris, et al. v. Sears Roebuck Company, et al. 2,500,000

Product liability. Near-death of three teen-age girls from carbon monoxide poisoning caused by third-hand gas water heater which was improperly installed by owner's grandson. Plaintiffs alleged failure to warn (instruction book was lost by previous owner). A fourth victim died [see Wrongful Death verdicts]. Fifth plaintiff was not present (she was in nursing home) but still received $1 million verdict, of which $250,000 punitive award was affirmed on appeal. CV-90-35 (Lowndes Co. February 27, 1992). Affirmed on appeal, 630 So.2d 1018 (Ala. 1994).

Cooper & Associates v. Central Life Assur. Co. 2,000,000

Employment contract. Insurance agents sued company alleging fraud and breach of contract causing lost commissions. Compensatory damages of $1,668,328 for lost commissions. Punitive damages reduced to $300,000. CV-87-503-CH (Jefferson County, 1992). Appeal, 614 So.2d 982 (Ala. 1993).

Milton and Joanne Core v. H. & R. Block 2,000,000

Tax preparation. Fraud. Plaintiff alleged fraudulent mishandling of tax refund. Verdict of $254.50 compensatory damages $2 million in punitive damages. Punitive verdict set aside by trial court. CV-91-43 (Chambers County September 3, 1992).

Todd v. United Steelworkers of America 2,000,000

Labor union. Nonstriking employee sued union for conduct of its members during strike causing property damage & mental anguish. Verdict of $10,000 compensatory damages and $2 million punitive remitted by trial court to a total of $26,131.00. Affirmed on appeal, 441 So.2d 889 (1993).

Grimes v. Stewart 2,000,000

Co-employee suit. Plaintiff claimed he developed leukemia from exposure to Benzine vapors while working to remove underground gas storage tanks. Verdict of $8.25 million included $2 million past damages; $2.25 million future damages and $2 million punitive damages. CV-91-1846 (Madison County, October 23, 1992). Reversed on appeal, 628 So.2d 467 (Ala. 1993).

Thompson et al. v. Montie Turner et al. 2,000,000

Fraud. (Default judgment) Judge entered judgment for $150,000, but later set it aside and re-entered judg-

ment for $2 million punitive. Compensatory damages of $10,654. CV-91-320 (Russell County, December 4, 1992).

Martin v. Robbins 2,000,000

Real estate. (Default judgment) Plaintiff alleged that defendant fraudulently induced her to sell parcels of property. Default judgment of $2 million punitive damages. CV-91-959-P (Baldwin County, 1992) Default upheld, but remanded for reconsideration of amount of punitive damages award, 628 So.2d 614 (Ala. 1993).

Lowery v. Bisbee et al. 1,500,000

Medical liability. Mental patient whom Bryce Hospital treatment team had released to custody of his aunt four months earlier assaulted his own sister, who sued the team for negligence and wantonness. CV-85-647.01-W (Tuscaloosa County, February 28, 1992) (Judgment reversed on lack of proximate cause, 623 So.2d 1047 (Ala. 1993).

Big B, Inc. v. Cottingham 1,000,000

Negligent supervision. Plaintiff alleged that assistant store manager falsely imprisoned her and forced her to engage in sex act upon threat of prosecution for shoplifting. Compensatory damages $5,000. Remitted on appeal to $600,000 after comparative analysis, 634 So.2d 999 (Ala. 1993).

Foster v. Life Ins. Co. of Georgia 1,000,000

Insurance. Agent fraud. Captive agent sold a Medicare-supplement policy and collected premiums for three years from a 71-year-old woman who could not read or write. She later made a claim which was denied because she did not have underlying Medicare coverage. Compensatory damages of $250,000 included mental anguish.

(Mobile County, November 4, 1992) Affirmed on appeal, conditioned upon remittitur of compensatory to $50,000, 1994 WL 9571 (1994).

Holt, et al. v. Arvin C. Moore, et al. 600,000

Business tort. Fraud/securities violations involving investments in exploratory oil wells. Multiple parties and compensatory awards. CV-84-213-RDC (Jefferson County, Oct. 5, 1992).

Booth, Inc. v. Britamco Underwriters, Inc. 620,000

Legal malpractice. Verdict arising from a conflict of interest in an insurance defense setting, where the insurer had retained the attorneys under a reservation of rights, but defense counsel undertook actions which adversely affected the insured's claim for coverage. CV-91-346 (Tuscaloosa County, November 12, 1992).

Bernice White v. Charles Harper, et als. 500,000

Lender liability. Plaintiff alleged fraud and bad faith involving sale of credit life insurance. (Tallapoosa County, August 12, 1992).

Henderson v. Alabama Power Co. 500,000

Electric utility. Teenage boy shocked while climbing transmission tower which allegedly was not properly guarded. Compensatory damages approximately 15,000. Punitive award remitted to $250,000 per punitive damages cap statute CV-88-992-W (Tuscaloosa County, 1992) On appeal, punitive damages cap held unconstitutional. Full verdict reinstated, 627 So.2d 878 (Ala. 1993).

Alfa Mutual Ins. Co. v. Veal 400,000

Insurance. Plaintiff who suffered work-related injury filed fraud and conversion action against workers comp

carrier and tortfeasor's insurer alleges his signature was fraudulently forged on check containing release language. Compensatory damages $2,000. CV-88-3416 (Jefferson County, 1992) Affirmed, So.2d 1292 (Ala. 1993).

Ex parte Martin 300,000

Insurance. Agent fraud. Plaintiff alleged fraud by agent in sale of med insurance. Plaintiffs settled with several defendants (for $225,000). Jury returned $300,000 verdict against remaining defendants. Mandamus petition, So.2d 1381 (Ala. 1992).

Kitchens v. Maye 250,000

Assault/Battery. Plaintiff shot in groin by defendant. Non-jury verdict $350,000 treated on appeal as $100,000 compensatory and $250,000 punitive requested in complaint. CV-9-064-I. (Cleburne County, 1992) Remanded for Green Oil hearing on amount of punitive damages, 623 So.2d 1082 (Ala. 1993)

Ford New Holland Inc. v. Proctor-Russell Tractor Co. 200,000

Business tort. Dealer termination. Plaintiff alleged that Ford fraudulently suppressed its intention to terminate the dealership contract early. Compensatory damages $65,000. Reversed on appeal, 630 So.2d 395 (Ala. 199?)

Willett v. Price-Williams et al 196,000

Conversion. Owner of tractor/trailer who was in default on truck payment sued repo-man for alleged misrepresentation in tricking him out of the truck so it could be repossessed. General verdict including punitive damages. (Mobile County, 1992) Reversed for new trial. 1994 WL 21917 (Ala. 1993) Settled for $95,000.

Fair v. James E. Luke Jackson, et al. 175,000

Assault/Battery. Personal injuries sustained during a fight. Compensatory damages of $26,500. CV-92-024-S (Covington County, November 18, 1992).

Garrett v. City of Auburn 150,000

Employment contract. Firefighter sued city manager for breach of contract and fraud arising out of their failure to promote him to captain. Compensatory damages of $2,268 against city. Punitive award against city manager. CV-90-423-G (Lee County, 1992) Affirmed on appeal, 623 So.2d 1033 (Ala. 1993).

Bowden v. Timothy Morrow, et al. 125,000

Medical liability. Urologist allegedly injected improper solution into patient causing permanent damage. Compensatory damages of $625,000. CV-90-1897-PR (Montgomery County, June 24, 1992).

Birmingham Saw Works, Inc. v. Cabnetware, Inc. 100,000

Business tort. Computer software distributor sued manufacturer for fraud and breach of 10-year contract. Manufacturer cancelled after one year, causing lost future profits by distributor. Compensatory damages of $473,000. CV-89-4436-M (Jefferson Co. February 12, 1992). Reversed on appeal, 614 So.2d 1034 (Ala. 1993).

Braxton v. Tommy Legrone 100,000

Fraud/Breach of Contract. Purchaser of motor home sued defendant for breach of contract and fraud. No compensatory damages awarded CV-91-717-H (Tuscaloosa County, October 19, 1992). Not appealed.

Lozier Corporation v. Gray 100,000

Retaliatory discharge. Plaintiff terminated after filing workers comp claim, and after employer discovered she

failed to disclose a prior claim on her job application. Actual damages of $11,000. Compensatory award of $200,000 remitted because plaintiff presented no evidence she suffered any mental anguish. CV-91-63 (Jackson County, 1992). Punitive damages affirmed in full, 624 So.2d 1034 (Ala .1993).

1992

(Wrongful Death)

Little v. Fontaine Trucking Company 25,000,000 25,000,-000

Product liability. Truck trailer. Alleged failure to install backup alarms on trailers. (Greene County, November 6, 1992).

Harris v. Sears, Roebuck & Company, et al. 4,000,000

Product liability. Death of teenage girl from asphyxiation caused by third-hand gas water heater which was not properly installed by owner's grandson. Alleged defective warning because instruction book had fallen off while owned by previous owner. Co-defendant utility settled for $1 million and another component manufacturer settled for undisclosed amount. CV-90-35 (Lowndes County, February 27, 1992). Affirmed on appeal, 630 So.2d 1018 (Ala. 1993).

Penny Daily v. Mazda 1,600,000

Product liability. Death of minor after a door latch on Mazda automobile failed. CV-90-574 (Colbert County, May 5, 1992).

Marinelli & Madonia v. Volkswagen 1,566,660

Product liability. Wreck of "Thing" resulted in two verdicts of $783,333 to parents of two deceased teenagers. Parent claimed the "Thing" was never tested for

"coll-over stability" before being sold in U.S. CV-89-3301 (Jefferson County). Affirmed on appeal, WL 325225 (1993).

Estate of Dorough v. City of Hoover 1,500,000

Municipality. Intoxicated driver traveling wrong way on I-495 was fatally shot by police officer trying to stop him. Driver was drinking at local bar nearly all day, at one time was sleeping on the bar, and his BAC was three times the legal limit. Alleged violation of constitutional rights brought additional verdict of $5,500. CV-91-557 (U.S.D.C. N.D. Ala. January 17, 1992).

James v. Harry D. Taylor, Jr. et al. 800,000

Dram shop. Wrongful death of daughter killed by alleged drunk driver. CV-91-421-PH (Montgomery County, April 8, 1992). Judgment satisfied.

Watkins, Adm. v. Up-Right Inc. 775,000

Industrial. Scaffold overturned killing middle aged man with wife and two children. CV-89-135 (Marion County, Sept. 4, 1992).

1991

(Non-Wrongful Death)

Steiner Marine v. RCA and General Electric 50,000,000

Business tort. Breach of contract and fraud involving fraudulent cancellation by RCA of contract to build navy ships after plaintiff had already tooled up. Compensatory damages of $1.3 million. No. CV-88-0058-RV (U.S.D.C. S.D. Ala., March 4, 1991). Settled post-trial for undisclosed amount

Mattie Person et al. v. Union Mortgage Co. et al. 45,-000,000

Lender liability. Five plaintiffs awarded $45,000,000 alleging they were defrauded on loans approved for repairs on their homes. Hidden finance charges. Proof of pattern and practice. CV-90-048 (Barbour County, July 24, 1991). Settled after trial.

Sheridan v. Northwestern Mutual Ins. Co. 25,000,000

Insurance. Agent fraud. Agent stole premiums and disappeared. Separate verdicts of $12.4 million in punitive damages against company and agent, which trial court combined for $25 million verdict against company. CV-89-2505-PR (Montgomery County, December 19, 1991). Affirmed on appeal with remittitur to $12,863,624. 630 So.2d 384 (Ala. 1993).

Boykin v. Trinity Ins. Co. 6,250,000

Insurance. Bad faith. Uninsured motorist claim denied by insurer in bad faith. CV-90-02 (Barbour County, September 1991). Settled during appeal.

Barlow et al. v. Union Mortgage Co. 6,000,0000

Lender liability. Claim of fraud, conspiracy and breached contract involving $2,000 home repair loan. Allegation of "hidden" finance charge. Award of $150,-000 compensatory damages and $6 million in punitive damages upheld by trial judge. Pattern or practice. CV-89-22-G (Lowndes County, 1991). Affirmed, 595 So.2d 1335 (Ala. January 31, 1992).

Toole v. Baxter Healthcare Corp. 5,000,000

Product liability. Breast implant verdict of $5,000,000 punitive damages against manufacturer remitted by trial court to $2 million, 778 F. Supp. 1543 (M.D. Ala.

1991). Reversed by Eleventh Circuit, 999 F.2d at 1430 (1993).

Southern Life & Health Ins. Co. v. Turner 5,000,000

Insurance. Bad faith. Refusal to pay $1,000 death benefit. Punitive award remitted by trial court from $5 million to $500,000 and affirmed, 586 So.2d 854 (Ala. 1991). Punitive award vacated and remanded by U.S. Supreme Court, 111 S.Ct. 1678. Settled after remand.

Lindblom v. Intercontinental Life Ins. Co. 3,000,000

Insurance. Bad faith. Suit for nonpayment of $10,000 death benefit. Insurer's acceptance of premium payments after expiration of grace period constituted willful misrepresentation that policy remained in force. CV-86-7156-M (Jefferson County). Affirmed conditional upon remittitur to $1 million, 598 So.2d 886 (Ala. 1992).

Cahaba Land Associates, Inc. v. Secor Bank 1,270,0000

Lender liability. Award of $3.3 million for fraudulent inducement of plaintiff's to purchase land based upon promise to refund money if real estate deal not profitable. Unauthorized cashing of checks (conversion) and breach of contract. CV-88-4065-R (Jefferson County, Sept. 23, 1991). Reversed on appeal and remanded for new trial, 619 So.2d 1372 (1993).

Crowell v. Reserve Nat. Ins. Co. 1,000,000

Insurance. Verdict of $25,000 compensatory and $1,000,000 punitive involving supplemental health insurance policy issued to elderly couple. Insurer denied approximately $800 as related to pre-existing condition. Trial judge remitted punitive award to $600,000. CV-90-1863-PH (Montgomery County, October 25, 1991). Affirmed, 614 So.2d 1005 (1993).

Roberts v. Federation of American Consumers and Travelers, et al. 1,000,000

Insurance. Fraud. Claim alleging fraudulent representation by an insurance company. $500,000 in compensatory damages and $1,000,000 in punitive damages. CV-89-634 (Calhoun County, September 13, 1991).

Callahan v. Thomas W. Fulton, et al. 1,000,000

Business tort. Close corporation. Minority shareholder and director of family-owned closely held corporation sued majority shareholders and directors alleging breach of fiduciary duty, conspiracy and intentional depreciation of stock. Punitive damages of $1,000,000 and $2.9 million Compensatory damages. CV-91-1226-BLK (Mobile County, November 12, 1991). Punitive award reversed for new trial, 621 So.2d 1235 (Ala. 1993). Settled.

Barbour v. Associates Financial Services Co. 700,000

Lender liability. Plaintiffs who purchased property from purchaser of property at foreclosure sale from finance company sued the finance company for misrepresentations regarding status of title to property. Compensatory damages of $15,000. CV-86-3310 (Mobile County). Affirmed, 592 So.2d 191 (Ala. 1991).

Mease v. Southern Technical College Edge v. Southern Technical College 700,000

College. Compensatory damages of $10,000 and punitive damages of $450,000 and $250,000 respectively to two plaintiffs who sued trade school for misrepresenting the transferability of course credits. CV-90-663-PH (Montgomery County, March 7, 1991). Settled.

Delchamps v. Lela Morgan 400,000

Malicious prosecution. Plaintiff was arrested and accused of stealing a pack of cigarettes. She was acquitted in the criminal trial. Sued Delchamps for malicious prosecution. Compensatory damages of 85,000. Punitive award reversed, remanded for new trial, 601 So.2d 442 (Ala. 1992).

Smith v. States General Life Ins. Co. 250,000

Insurance. Agent fraud. Plaintiff sued insurer for fraud in sole of policy of medical insurance policy for failure to remove rider exclusion of heart conditions as promised by agent. Compensatory damages of $600. Trial court entered judgment awarding the punitive damages to the American Heart Association. CV-89-2449-RGK (Mobile County). Full amount of verdicts affirmed, but award to Heart Association reversed, 592 So.2d 1021 (Ala. 1992).

Caterpillar Inc. v. Hightower 250,000

Product liability. Defective design claim by skidder operator who was injured when broken tree trunk protruded into operator's compartment. Important decision on right to recover punitive damages where no compensatory damages were awarded. CV-88-331 (Lee County). Affirmed, 605 So.2d 1193.

Goff v. Gary Dornfleth Nissan 200,000

Automobile sales. Misrepresentation involving sale of vehicle. Compensatory award of $12,500. CV-90-887-RLK (Mobile Co. Apr. 5, 1991).

Mokrzycki v. Continental Eagle Corp. 100,000

Retaliatory discharge. Plaintiff terminated after filing workers comp claim for back injury. Defendant claimed

plaintiff terminated self by failing to report status as required by company policy. Compensatory damages $122,-240. CV-90-662-PR (Montgomery County, June 21, 1991). Affirmed on appeal, 611 So.2d 313 (Ala. 1992).

Delchamps, Inc. v. Larry 100,000

Malicious prosecution. Arrestee who was acquitted on charge that he stole steaks from grocery store filed malicious prosecution suit. Compensatory damages $30,000. CV-90-0610-R (Jefferson County, 1991). Affirmed on appeal, 613 So.2d 1235 (Ala. 1992).

Copeland v. Globe Life & Accident Ins. Co. 100,000

Insurance. Agent fraud. Representation by agent that health insurance would cover everything including pregnancy and child birth. Wife became pregnant and health policy provided maximum pregnancy benefit of $2,000. Plaintiffs claim they relied upon representation that they were fully insured. Compensatory damages of $3,353.65. CV-89-2739-RI B (Mobile Co. Jan. 24, 1991).

Independent Fire Ins. Co. v. Lunsford 100,000

Insurance. Bad faith. Insureds sued Independent for breach of contract and bad faith refusal to pay. Compensatory damages $25,000 CV-90-49B (Lowndes County, 1991). Punitive award reversed on appeal, but court affirms compensatory award and recognizes right to recover damages for mental anguish for breach of insurance contract, 621 So.2d 977 (Ala. 1993).

1991

(Wrongful Death)

General Motors Corp. v. Johnston 15,000,000

Product liability. Seven year-old passenger killed when pickup truck stalled and was struck by tractor trailer.

Plaintiff alleged that truck was defective because of stalling caused by faulty computer chip. CV-88-117 (Maengo County). Remittitur of punitives to $7,500.00 on appeal. 592 So.2d 1054 (Ala. 1992).

Allen v. Physicians' Weight Loss Centers 15,000,000

Weight loss. Death of 23 year-old who died from an irregular heartbeat after losing 21 pounds in weight-loss program. CV-89-1969 (Mobile Co. June 5, 1991). Settled post-trial for undisclosed amount.

Madden v. Magnolia Bay d/b/a Family Planning Medical Center 10,000,000

Medical liability. Death of 18-year-old student after having an incomplete abortion. CV-87-899 (Mobile County, June 5, 1991) On appeal. See 1993 WL 10349.

Lee v. Children's Hospital of Alabama, et al. 6,875,000

Medical liability. Death of child from improper catheterization while hospitalized for treatment of burns. Evidence of cover-up by defendants. CV-86-1941-W (Jefferson County, 1991) Affirmed on appeal, 603 So.2d 937 (Ala. 1992).

Garner v. City of Opp 750,000

Municipality. Death of 19-month-old child killed in car accident which allegedly occurred because of improperly maintained stop sign. Trial court reduced verdict to $100,000 pursuant to municipal liability cap. Affirmed, 1993 Ala. Lexis 586.

Inge v. State Farm Mutual Automobile Ins. Co. 250,000

Motor vehicle. Wrongful death. CV-90-1981-PH Remitted to $75,000 with concurrence of plaintiff. (Montgomery County, September 17, 1991) Judgment satisfied.

1990

(Non-Wrongful Death)

Braun v. Soldier of Fortune 10,000,000

Media. Negligence of magazine for allowing advertisement by professional hit-man. Verdict of $10 million punitive damages and $400,000 compensatory damages, plus $2 million in compensatory to be shared by Michael Braun and Ian Braun. Remittitur of punitive damages by trial court to $2.375 million, 757 F.Supp. 1325 (M.D. Ala. 1990). Affirmed on appeal, 968 F.2d 1110 (1992), cert. denied, 113 S. Ct. 1028.

Overstreet v. Insurance Company of North America, et al. 10,000,000

Insurance. Agent fraud. $10,000,000 punitive damages award against agency individuals dismissed. CV-86-002312 (Mobile County, June 8, 1990).

Smith v. MBL Life Assurance Corp. 4,500,000

Insurance. Bad faith. Alleged fraud and bad faith on question of existence of life insurance policy. Compensatory damages $250,000. Punitive award set aside by trial court. CV-84-3028 (Jefferson County, June 1990). Affirmed on appeal, 589 So.2d 691 (Ala. 1991).

Elliott v. Brunswick Corp. 3,000,000

Product liability. Boat propeller struck and injured plaintiff. Compensatory damages of $1.5 million and punitive damages of $3 million. (N.D. Ala.) Reversed on appeal, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1948 (1991).

White, et al. v. Georgia Casualty Ins. Co. 2,000,000

Insurance. Bad faith. Uninsured motorist carrier allegedly refused in bad faith to settle UM claim, and mis-

represented insured's right to stack benefits C-84-37-R (Barbour County, 1989) Reversed and remanded on grounds that tort claims did not survive insured's death, 582 So.2d 487 (Ala. 1991).

Roberts v. National Security Insurance 2,000,000

Insurance. Fraud. Claim involving breach of contract and fraud, but only the fraud claim went to the jury. CV-87-4063 (Jefferson County, October 8, 1990). Settled post-trial.

King v. Pioneer Life Insurance Co. 1,977,000

Insurance. Bad faith. Total verdict of $2,000,000 includes compensatory damages of $23,000 and punitive damages of $1,977,000, CV-87-152 (Escambia County, July 26, 1990).

Kitchens Foods, Inc. v. Arby's, Inc., et al. 1,500,000

Business tort. Misrepresentations by sellers in sale of franchise. CV-88-0761-P-M (U.S.D.C. S.D. Ala., June 28, 1990).

Backus v. The Club 90, Inc. 1,000,000

Dram Shop. Auto accident in which plaintiff was severely injured in a head on collision with intoxicated driver. Plaintiff's medical expenses were approx. $150,000. Compensatory damages of $700,000. (Mobile County, September 27, 1990).

Burden v. Empire Fire & Marine Ins. Co. 1,000,000

Insurance. Bad faith/Uninsured Motorist. Alleged bad faith failure to settle an uninsured motorist claim. Compensatory damages of $400,000, punitive damages of $1 million. CV-88-244 (Lauderdale County, March 2, 1990). Appeal dismissed, 607 So.2d 388 (1991).

Beatty v. Ford-New Holland Tractor Co. 1,000,000

Malicious prosecution. Compensatory damages of $25,000 and punitive damages of $1 million. Reversed & rendered on appeal, 602 So.2d 1198 (1992).

Braden v. Dorsey Motor Sales, Inc. 1,000,000

Automobile sales. Alleged fraudulent misrepresentation by car dealer that a used car was "new." Compensatory damages $15,600. CV-89-004 (Autauga County, March 22, 1990).

Northington v. Alfa Ins. Co. 750,000

Insurance. Bad faith. Total verdict of $850,000 against insurer for failure to renew insurance coverage. Affirmed on appeal, 604 So.2d 758 (Ala. 1991).

American Employers Ins. Co. of Southern Seeding Services 750,000

Insurance. Fraud. Compensatory damages of $400,000 and punitive damages of $750,000. CV-87-G-0294S (U.S.D.C. N.D. Ala., February 22, 1990)

Harris v. M & S Toyota, Inc. 500,000

Automobile sales. Used car buyers sued seller for fraud arising out of seller's statement that used car had never been wrecked. They later found "bondo" on damage site. After the jury returned a verdict for $502,500.00 the trial court granted defendant's Motion for New Trial on prejudicial effect of testimony about the dealers earlier settlement of similar claim. Affirmed, 575 So.2d 74 (Ala. 1991).

Shoemaker v. Smith 5,000,000

Business tort. Purchaser of printing services sued seller for fraud and breach of contract. C-86-935-M (Jefferson County, 1990) Affirmed, 589 So.2d 171 (Ala. 1991).

The Standard Plan v. Tucker 500,000

Insurance. Bad faith. Jury found insurance agency guilty of negligence and awarded $1,083.19 in damages; also found against insurer on claim of breach of contract and bad faith failure to pay claim and awarded $500,000 in punitive damages. Affirmed, 582 So.2d 1024 (Ala. 1991).

Brown v. United Companies Financial Corp. 250,000

Lender liability. Homeowners sued company financing home improvements for fraud and breach of contract when company obtained homeowner's endorsement on check and certificate of completition to release money prior to contractor's completion of work. Compensatory damages $250,000. CV-88-56-G (Lowndes County, 1989) Affirmed, 584 So.2d 470 (Ala. 1991).

Carroll v. Glisson 100,000

Construction contract. Fraud and breach of contract involving construction of home. Plaintiff alleged defendant suppressed knowledge of deficiencies and failure to meet building code requirements. Compensatory damages of $25,000. CV-89-2405 B (Mobile County, October 16, 1990).

American Cast Iron Pipe Co. v. Williams 100,000

Retaliatory discharge. Plaintiff, who was injured on job using jackhammer, was terminated upon attempt to return to work. Compensatory damages $80,000. CV-88-4871-W (Jefferson County, 1990) Reversel on appeal, 591 So.2d 854 (Ala. 1991).

Waldon v. United Insurance Co. et al. 154,000

Insurance. Fraud. Plaintiff alleged fraud and breach of contract for failure to pay medical bills for back surgery. Compensatory damages of $3,820. CV-87-1222

(Montgomery County, January 20, 1990) Judgment satisfied.

1990

(Wrongful Death)

Wilburn v. Luxaire, et al. 50,000,000

Product liability. Five family members died of asphyxiation during Christmas week from a gas furnace that was not correctly vented. Codefendant gas company and other defendants settled before trial for $11,500,00. CV-88-147-DU et seq. (Mobile County, March 23, 1990) Settled on appeal.

Ingram v. Anniston Medical Clinic 3,500,000

Medical liability. Widow alleged that doctor and clinic were negligent in misdiagnosing decedent's irregular heartbeat. His heart stopped later that night. CV-86-611 (Calhoun County, August 11, 1990).

Chumney, Administrator v. Flowers Hospital 3,000,000

Medical liability. Death of child. CV-87-587 (Houston County, March 9, 1990). Settled post-trial.

Jahandarfard v. Killough, et al. 2,500,000

Landlord liability. Plaintiff's minor daughter died from smoke inhalation due to landlord's failure to equip apartment with smoke detector. CV-88-1269P (Madison County, November 8, 1991) Affirmed on appeal, 578 So.2d 1041 (1991).

Lakeman v. P.P.G. Industries 2,250,000

Product liability. Wantonness in wrongful death case. (U.S.D.C. S.D. Ala., February 22, 1990).

Estate of Conley v. Flav-O-Rich 2,000,000

Negligent maintenance. Milkman died when delivery truck overturned due to negligently maintained steering. CV-87-0073 (Jefferson County, November 5, 1990).

Estate of Meadows v. Ridgeview Healthcare Center 2,000,000

Nursing home. Suit against nursing home in which decedent resided at time of his death, alleging that death resulted from an assault by decedent's roommate. CV-87-501 (Walker County). Reversed and remanded, 590 So.2d 243 (1991).

Thornton v. Yamaha Motor Co. Ltd., et al. 750,000

Product Liability. Death of a child whose Christmas present motorbike crashed. CV-88-1639-T (Montgomery County, April 26, 1990). Affirmed on appeal, 579 So.2d 619 (Ala. 1991). Important decision on "contributory negligence" as defense.

Hays, Admin. v. City of Greenville, et al. 625,000

Municipality. Motor vehicle accident causing death involving alleged negligence, wantonness, DUI. CV-89-209 PH (Montgomery County, March 9, 1990). Not appealed.

Valley Building & Supply, Inc. v. Lombus 600,000

Motor vehicles. Trucking. Delivery truck backed onto highway during rush hour after unloading at store. Remanded for Hammond/Green Oil review of excessiveness of verdict. CV-89-080 (Talledega County). Affirmed after remand, 590 So.2d 142 (Ala. 1991).

Rollins v. Bad Man Promotions et al. 200,000

Chiropractor. Chiropractor allegedly failed to diagnose fighter's hypertension during pre-fight physical. Decedent

won the fight, collapsed on stage and died. CV-88-942-K (Montgomery County, February 14, 1990). Judgment satisfied.

1989

(Non-Wrongful Death)

Sigafoose v. Babson Brothers Co. 10,000,000

Business tort. Fraudulent sale of livestock semen which was not as represented. Punitive damages of $10 million, compensatory claim verdict of $21,000. (Baldwin County). Settled post trial and appeal dismissed, 596 So.2d 56 (1989). Confidential settlement (reported unofficially as $1.9 million).

Braswell v. Conagra 9,100,000

Business tort. Chicken growers sued buyers alleging fraud and breach of contract arising out of misweighing chickens over an eight year period. Compensatory damages $4,050,000 and Punitive damages $9,100,000. CV-88-CV-00741-T-S (U.S.D.C. M.D. Ala., November 27, 1989). Affirmed on appeal, 936 F.2d 1169 (1991).

Joiner v. United American Insurance Co. 3,000,000

Insurance. Fraud. Verdict of $80,000 compensatory and $3 million punitive; reduced by trial court to $960,000 (U.S.D.C. M.D. Ala., November 15, 1990).

Ford v. Colonial Mortgage Co. 3,000,000

Lender liability. Fraudulent breach of residential home loan commitment. CV-89-010 (Russell County, November 21, 1989).

Clarke v. Traffanstedt v. Estate of Thomas Holmes and Human Hospital-Muscle Shoals 2,500,000

Medical liability. Malpractice against hospital and estate of deceased physician. Verdict of $985,000 compensatory damages and $2.5 million punitive damages against hospital only. Reversed on appeal for inconsistency of verdict, 597 So.2d 667 (Ala. 1990).

Hilloy v. Allstate Insurance Co. 2,000,000

Insurance. Fraud. Failure of insurance company to pay fire loss on home insured for $38,000. Affirmed on appeal, 595 So.2d 873 (Ala. 1990).

American Mktg. Mortgage Co. v. National Group Corp. 2,000,000

Business tort. Fraud & intentional interference. Plaintiff was writing insurance policies for defendant. Compensatory damages award of $550,000. Total verdict remitted to $1,550,000 by trial court. CV-87-695-PH (Montgomery County, August 14, 1989).

Phillips v. United American Ins. Co. 1,800,000

Insurance. Bad faith. Refusal to pay $264 unpaid balance on medical claim. CV-87-132JSS (June 2, 1989). Settled post-trial.

E & S Facilities, Inc. v. Precision Chipper Corp. 1,750,000

Insurance. Agent fraud. Alleged fraud in procurement of products liability insurance. Verdict for $875,000 each against insurance agency and insurance broker/wholesaler. Affirmed on appeal, 565 So.2d 54 (Ala. 1990).

Scroggins v. Averbach Enterprises, Inc. 1,700,000

Premises liability. Apartment complex failed to provide adequate security and protection; plaintiff paralyzed from gunshot. CV-89-2152-P (Madison County).

Deutz-Allis Credit Corporation v. Turner 1,609,500

Lender liability. Fraud claim. Settled post-trial. CV-85-043 (Barbour County, October 9, 1989). Appeal dismissed, 596 So.2d 66 (Ala. 1990).

Terry v. John Carner and Leisure American, Inc. 1,500,-000

Fraud. Actual damages of $5,500. CV-85-6777 (Jefferson County, November 1, 1989). Settled prior to appeal.

Carlis v. Richard J. Gibson, et al. 1,000,000

Insurance. Fraud involving sale of credit life insurance; approximately $1,000 compensatory damages. Punitive damages remitted to $250,000. CV-87-30 (Macon County , April 19, 1989).

Fuller v. Preferred Risk Life Ins. Co. 1,000,000

Insurance. Fraud. Compensatory damages of $16,-764.82 on breach of contract; compensatory damages of $1.00 on fraud count; and punitive damages of $1 million on fraud count. Punitive damages remitted to $250,-000 by trial court. CV-88-74-M (Montgomery County) Alabama Supreme Court reversed and reinstated full $1 million verdict, 577 So.2d 878 (Ala. 1991).

Ramsey Health Care, Inc. v. Folmer 800,000

Employment contract. Claims by terminated chief financial officer for breach of contract and fraud, alleging he did not receive all the compensation he was promised

after termination. Affirmed on appeal, 506 So.2d 746 (1990).

Battles Entertainment, Inc. v. First Federal Savings and Loan Assoc. of Russell County, et al. 800,000

Real estate. Fraud in connection with sale of land. CV-88-083 (Lee County, April 14, 1989). Settled post-trial.

McDonald v. Continental Casualty Co. (CNA) 750,000

Outrage. Late payment of workmen's compensation benefits. (Houston County). Affirmed on appeal, 567 So.2d 1208 (Ala. 1990).

Green Tree Acceptance, Inc. v. Standridge 750,000

Reposession. Claims of fraud, conversion and outrage involving sale and repossession of mobile home, CV-87-710 TH (Montgomery County, 1988). Judgment on outrage claim reversed and remanded, remainder affirmed, 565 So.2d 38 (Ala. 1990).

Massachusetts Mutual Life Ins. Co. v. Collins 750,000

Insurance. Agent fraud. Insured alleged that he was fraudulently induced into purchasing additional life insurance by taking loans against existing policy. CV-86-166-M (Marion County, 1988). Affirmed on appeal, 575 So.2d 1005 (Ala. 1990).

Blackburn, et al. v. Altus Bank 500,000

Lender liability. Claims of fraud by two plaintiffs, resulting in total verdicts of $2,038,753. CV-88-2263 (Mobile County, November 30 1989). Appeal dismissed, 607 So.2d 388 (1991).

Watson, Watson & Rutland v. Rosser Fabrap Int'l. 700,000

Business tort. Intentional interference with business relationship. CV-88-II-1292-N (U.S.D.C. M.D. Ala. October 19, 1989).

Bryant v. R & S Materials 450,000

Environmental. Plaintiff alleged defendant surface mining company polluted commonly owned lake. CV-88-1594-PR (Montgomery County, July 17, 1989). Settled on appeal.

Fraser v. Reynolds 375,000

Real estate. Fraud in sale of apartment complex; actual damages of approximately $15,000. First trial resulting in verdict of $30,000 was reversed for lack of evidence to support jury verdict. Second trial resulted in $375,000 punitive verdict. Remanded for Hammond/Green Oil hearing on excessiveness, 588 So.2d 442 (1990). Affirmed conditioned upon remittitur of $26,-217.09, 588 So.2d 488 (Ala. 1992).

John H. Vella et al. v. Roberts Brothers, Inc. 275,000

Real estate. House purchasers sued title company and listing agent for failure to disclose I.R.S. right of redemption. Recovery for mental anguish allowed even if no physical symptoms corroborated the anguish. Compensatory damages of $100,000, punitive damages $275,000. Trial judge apportioned punitive damages between two defendants, based upon excessiveness as to one of the defendants. CV-85-1973-RGK (Mobile County, 1989). Affirmed, 570 So.2d 578 (Ala. 1990).

O.K. Bonding Co. v. Milton 225,000

Assault/trespass. Women and children whose homes were subject to armed intrusion by surety agents seek-

ing "bailjumper" sued the surety and person who instructed its agents, CV-84-75-R (Shelby County, 1989). Affirmed on appeal, except as to one plaintiff who was awarded no nominal or compensatory damages, 570 So.2d 602 (Ala. 1991).

Key et al. v. McDowell 190,000

Real estate. Plaintiffs alleged that the land purchased was only a portion of the land they were fraudulently led to believe they were purchasing. General verdict with actual damages of $10,000. CV-87-2472-T (Jefferson County, March 3, 1989). Affirmed on appeal, 557 So.2d 1243 (Ala. 1990).

Rodopoulos v. Sam Piki Enterprises, Inc. 170,000

Business tort. Pizza franchise purchasers sued sellers alleging fraud, deceit and breach of contract arising from misrepresentation regarding projected gross earnings for pizza business. CV-86-422-Q (Calhoun County, 1989) Affirmed on appeal, 570 So.2d 661 (Ala. 1990).

Spirit Nissan, Inc. v. Ogburn 125,000

Automobile sale. Lessees sued dealer and lessor alleging they were fraudulently induced to enter into the lease by defendants' false representation that the vehicle was equipped with power steering. CV-87-145 (Talladega County, 1989) Affirmed on appeal, 572 So.2d 1248 (Ala. 1990).

Charter Hospital of Mobile v. Weinberg 107,000

Employment contract. Doctor who was formerly employed at hospital sued for wrongful termination and wrongful conversion of a drug and alcohol abuse treatment program which he developed. Compensatory damages of $152,000. CV-80-1858 BLK (Mobile County, 1989) Reversed in part for new trial on punitive damages, 558 So.2d 909 (Ala. 1990).

Finley v. Jerry Griggs and Wanda Griggs 100,000

Real estate. Buyers and sellers alleging misrepresentation that property was located on public road, and suitable for placement of septic tank and that adjacent land would be deeded to purchaser after sale. Compensatory damages $70,000. CV-87-20755 (Madison County, June 16, 1989). Affirmed on appeal, 565 So.2d 154 (Ala. 1990).

1989

(Wrongful Death)

Burlington-Northern R.R. v. Whitt 15,000,000

Railroad crossing. Wanton misconduct involving design and maintenance of railroad crossing. Remitted to $5,000,000 on appeal, 575 So.2d 1011 (1990).

Thornton v. Susan Ashbee, M.D., et al. 5,000,000

Medical liability. Failure to diagnose baby's spinal meningitis. CV-85-1275 (Mobile County, March 7, 1989). Appeal dismissed, 596 So.2d 57 (1989).

Turner v. Alabama Power Company 5,000,000

Electric utility. Truck driver electorcuted when door contacted an energized guy wire. CV-88-1700-PR (Montgomery County, August 30, 1989) Remitted on appeal to $3.5 million, 575 So.2d 551 (Ala. 1991).

Ruby Davis v. Montrose Bay Health Care Inc., et al 2,500,000

Nursing home. CV-86-196 (Mobile County, June 19, 1989).

Ballard v. Montgomery Health Care Facility 2,000,000

Nursing home. Estate of patient who died as the result of multiple infected bedsores brought negligence claim

against nursing home. CV-87-173-TH (Montgomery County, May 17, 1989) Affirmed on appeal, 565 So.2d 221 (1990).

Bever v. Beech Aircraft Corp. 1,500,000

Product liability. CV-81-2120 (Jefferson County 1989)

Kumar v. Lewis 875,000

Medical liability. Surgery to repair umbilical hernia injured left ureter, causing septicemia death of child. Verdict affirmed, 561 So.2d 1082 (Ala. 1980).

1988

(Non-Wrongful Death)

Joshua Medders, a minor, et al. v. Darlene Forsythe Harris 6,500,000

Medical facility, $65.5 million verdict against Harris only. CV-88-364 (Calhoun County).

State Farm Auto. Ins. Co. v. Robbins 5,000,000

Insurance. Bad faith/fraud. Insurance company denied $700 disability claim. Verdict remitted by trial court to $500,000. (Macon County, 1988) Affirmed on appeal, 541 So.2d 477 (Ala. 1989).

United Serv. Auto Ass'n v. Wade, 3,500,000

Insurance. Bad faith. None-jury verdict of $3.5 million punitive damages for bad faith. Compensatory damages of $166,795 plus $21,962 on contract court. Remitted to $2.5 million, 544 So.2d 906 (Ala. 1989).

Land & Associates, Inc. v. Simmons 2,500,000

Insurance. Bad faith. Also claims for fraud and breach of contract arising out of denial of $10,000 life insurance claim by wife of deceased. Brokerage agency held not liable for agent's misrepresentation. CV 862340RGK

(Mobile County) Affirmed on appeal, 562 So.2d 140 (1989).

Health America, et al. v. Menton 1,800,000

Insurance. Agent fraud. Agent allegedly induced plaintiff to drop former health insurance coverage and enroll under new employee group insurance plan by representing that plaintiff's son's pre-existing condition would be covered. The insurer later denied a $2,400 claim for medical benefits. CV-86-003049-BV (Mobile, Court) Affirmed on appeal, 551 So.2d 235 (Ala. 1989).

Barclay International v. First Ala Bank 1,800,000

Lender liability. Baldwin County banking case concerning letter of credit issued to plaintiff but called upon in full by First Ala. Bank; First Ala. Bank was awarded $1.8 million in counterclaim. CV-84-5000056Wi (Baldwin County) Reversed and remanded, 557 So.2d 1201 (1989).

Walls v. Colonial Mortgage Co. 1,700,000

Lender liability. Fraud involving breach of residential home loan commitment; compensatory damages of $2,500 or less. Settled pending appeal, (companion case to Ford v. Colonial Mortgage) CV-87-194 (Russell County, December 19, 1988).

Sidney Wright, III v. Preferred Research, Inc. 1,500,000

Insurance. Fraud. Plaintiff alleged that defendant wrote policy without having proper E&O coverage. Compensatory damages of $7,000. Remittitur of punitive damages to $150,000, CV-87-T-1046-S (U.S.D.C. Middle District, July 14, 1988). Affirmed by Eleventh Circuit.

State Farm Mutual Automobile Ins. Co. v. Hollis, Adm. 1,500,000

Insurance. Bad faith. Failure to settle lawsuit and wanton failure to file supersedeas bond. Reversed and re-

manded for new trial, 516 So.2d 576 (Ala. 1987). Affirmed after verdict in second trial, 554 So.2d 387 (Ala. 1989).

Porter v. Hook 1,300,000

Business tort. Fraud and breach of unwritten joint venture agreement against cable television owner. Remitted by trial court to $300,000. Full verdict reinstated by Supreme Court of Alabama, 554 So.2d 382 (Ala. 1989).

Pacific Mutual Life Ins. Co. v. Haslip 1,000,000

Insurance. Agent fraud. Agent misrepresented coverage and intercepted and pocketed premiums (with alleged knowledge of manager) thus allowing plaintiff's health insurance coverage to lapse. CV 82 2453 C (Jefferson County, 1988 Affirmed on appeal, 553 So.2d 537 (1989), affirmed by U.S. Supreme Court, 111 S.Ct. 1032 (1991).

Tarwick v. Michaels of Oregon Co. 1,000,000

Product liability. Hunter injured while climbing down from tree stand with loaded automatic rifle. Rifle fell and discharged. Plaintiff alleged swivel on should strap disconnected, causing gun to fall and discharge. Serious injury to arm. Total verdict $3.9 million. CV-88-C-413N (U.S.M.D. Ala., December 21, 1988). Settled pending appeal.

United American Ins. Co. v. Brumley 1,000,000

Insurance. Bad faith. Refusal of medicare supplement insured to pay a claim. Affirmed on appeal, 542 So.2d 1231 (Ala. 1989).

Carner, et al. v. Commercial Union Ins. Co., et al. 811,804

Insurance Bad faith denial of insurance claim. C-82-3504 (Jefferson County 1988).

Thomas v. Principal Financial Group, et al. 750,000

Insurance. Bad faith failure to pay $1,000 death benefit where insurer determined that dependent was not a "full time student" but was attending part-time beauty school. CV-87-2561 (Mobile County, 1988) Punitive award set aside by trial court, reinstated by Alabama Supreme Court on appeal, 566 So.2d 735 (Ala. 1990). Verdict held not excessive, 585 So.2d 816 (Ala. 1991).

Isbell v. Thompson Hayward Chemical Co., et al. 675,000

CV-88-162 (Jefferson Co. Cir. Ct.).

Adams v. The City of Bessemer, et al.

CV-88-222 (Jefferson Co. Cir. Ct.).

Trammell v. Bessemer Water Service, et al.

CV-87-627 (Jefferson Co. Cir. Ct.).

Municipality. Verdicts of $746,000 (675,000 punitive damages) for dangerous chemicals in water service.

Achord v. Mormar Incorporated 500,000

Products liability. Verdict of $863,625 included $500,000 punitive damages. CV-87-D-0824-N (U.S.M.D. Ala., September 6, 1988).

Vintage Enterprises v. Jaye 500,000

Mobile home sale. Purchasers sued seller for fraud, wantonness, negligence, warranty and Magnuson-Moss theories arising out of order and delivery of mobile home. Compensatory verdict $20,000. (Tallapoosa County). Affirmed, 547 So.2d 1169 (Ala. 1989).

The Ice House v. Aesco Steel Co. 332,000.

Construction contract. Plaintiff alleged negligent construction and fraud due to collapse of ceiling at plant.

Compensatory damages of $252,000. Remittitur denied. CV-87-84-G (Montgomery County, April 26, 1988). Appeal dismissed on joint motion.

Green Oil Co. v. Hornsby 150,000

Business tort. Suit against store owners for recovery of personal property and open account for gasoline delivered. Owners counter-claimed for breach of contract and fraud. Verdict on counterclaim for $14,704.06 in compensatory and $150,000 in punitive damages. (Macon County, 1988). Remanded for Hammond hearing and the trial court remitted the punitive damages verdict to $25,000. Affirmed, 539 So.2d 218 (Ala. 1989).

Abeta Travel Service, Inc. v. Ocean Cruise Lines 150,000

Travel agent. Abeta sued cruise ship agent alleging breach of contract and fraud for failure to provide accommodations on a particular cruise to passengers booked by travel agent. Jury awarded $100,000 in compensatory damages. CV-87-002471-J (Mobile County, June 9, 1988). Affirmed on appeal, 562 So.2d 295 (Ala. 1990).

Hargrove v. Cantrell 127,717

Automobile sale. Fraudulent odometer rollback. Verdicts of $23,134 compensatory damages and $127,717 punitive damages. Affirmed on appeal, 547 So.2d 488 (Ala. 1989).

Greene v. Robert Averi, DPM 100,000

Medical liability. Plaintiff alleged improper procedure was used in surgery on plaintiff's foot causing permanent damage. Compensatory damages $50,000. CV-87-1534-PII (Montgomery County, June 30, 1988).

1988

(Wrongful Death)

Heathcoat v. Mitchell Potts, et al. 3,000,000

Wrongful death. No. CV-85-7805, CV-85-7288 (U.S. District Court N.D. Ala. 1988).

Olympia Spa v. Johnson 3,000,000

Premises liability. Death of business patron by scalding in steam room of health club. (Mobile County). Affirmed on appeal, 547 So.2d 80 (Ala. 1989).

Clardy v. Sanders 2,750,000

Auto negligence. Sixteen year old motorist killed in automobile collision. Plaintiff alleged that other motorist was acting within the line and scope of his employment at the time of the accident. CV-87-448 (Montgomery County, November 15, 1988). Affirmed on appeal, 551 So.2d 1057 (Ala. 1989).

Proctor & Gamble Co. v. Staples 2,750,000

Industrial accident. Plaintiff alleged that the employer failed to provide safe work environment and that the employer negligently inspected the machine which killed the decedent. Judgment reversed on appeal, 551 So.2d 949 (Ala. 1989). Settled thereafter.

Shelby County Commission v. Bailey 1,000,000

Municipality. Estate of motorist and passenger killed in head-on collision with deputy sheriff's vehicle filed suit against county. Verdicts of $500,000 each for two deaths. Affirmed on appeal, 545 So.2d 743 (Ala. 1989).

Central Alabama Electric Corp. v. Tapley 1,000,000

Electric utility. Dump truck bed contacted power line. Affirmed on appeal, 546 So.2d 371 (Ala. 1989).

Williams v. Rust International 1,000,000

Wrongful death. CV-82-CV-174 (Jefferson County, 1988).

Mallory v. Hobbs Trailers 500,000

Product liability. Estate of employee killed when dump truck overturned on her filed suit against driver, trucking company and manufacturer of trailer. Trial court set aside the verdict, which was reinstated by Alabama Supreme Court, 554 So.2d 966 (Ala. 1989).

1987

(Non-Wrongful Death)

Estate of Jackson v. Phillips Petroleum Co. 5,100,000

Tortious interference. Conversion, intentional interference with contractual relations and wrongful exercise of lien rights. Reduced punitive damages from 5,041,690.04 to $300,000 in one case, 2,500,000 and from $2,519,439.85 to $150,000 in another. New trial granted on plaintiff's refusal to remit punitive damages, 676 F.Supp. 1142 (S.D. Ala. 1987).

Robbins v. National Security Insurance Company 2,00,000

Insurance. Fraud. CV-87-4063 (Jefferson County).

State Farm Fire and Casualty Company v. Balmer 1,500,000

Insurance. Bad faith. Verdict of $1,813,404 included $45,650 on breach contract, $265,000 compensatory damages and $1,500,000 punitive damages on bad faith claim. CV-86-D-742-N (Verdict August 5, 1987). Bad faith verdict set aside by U.S. District Court on Motion for JNOV, 672 F.Supp. 1395 (M.D. Ala. 1987).

Wal Mart Stores, Inc. v. Jones 200,000

Malicious prosecution. Customer brought action for false arrest, malicious prosecution, defamation, outrageous conduct and wantonness. The jury returned verdict on wantonness. Affirmed on appeal, 533 So.2d 551 (Ala. 1988).

1987

(Wrongful Death)

Dale, Estate of v. Dept. of Mental Health 11,675,000

Wrongful death. Employees of state mental hospital were accused of negligently releasing a mental patient who attempted a robbbery. CV-85-0138-K (Montgomery County, February 3, 1987). Reversed on appeal, 530 So.2d 770 (Ala. 1988).

Industrial Chemical & Fiberglass v. Chandler 5,000,000

Industrial accident. Two workers killed by explosion while repairing a fiberglass tank. Widows sued under AEMLD, alleging negligent failure to warn and breach of warranty. Jury verdict of $2.5 million for each widow. Affirmed, 547 So.2d 812 (Ala. 1988).

Talmage v. Humana Hospital Florence, et al. 1,500,000

Medical liability. CV-85-135 (Lauderdale County, September 10, 1987). Settled post-trial.

Alabama Power Co. v. Courtney 750,000

Motor vehicle. Trucking. Decedent's estate sued driver of vehicle and his employer for death resulting from collision. (Chilton County, 1987). Affirmed, 539 So.2d 170 (Ala. 1988).

Consolidated Freightways v. Pacheaco-Rivera 525,000

Motor vehicle. Trucking. Personal injury and wrongful death action brought by 3 plaintiffs. Jury awarded $525,000 for wrongful death portion of claim. That portion of the verdict was not remitted. Affirmed on appeal, 524 So.2d 346 (Ala. 1988).

Alabama Farm Bureau v. Hixon 500,000

Premises liability. Trailer park tenant sued park owner for death of child in a common swimming pool. Alleged failure to provide fence & lighting. CV-84-1447-PR (Montgomery County, February 4, 1987). Reversed on appeal, 533 So.2d 518 (Ala. 1988).

Alabama Power Co. v. Capps 500,000

Electric Utility. Dump truck bed contacted overhead power line (simple negligence). (Butler County). Affirmed on appeal, 519 So.2d 1328 (Ala. 1988).

1986

(Non-Wrongful Death)

Super Valu Stores, Inc. v. Peterson 5,000,000

Employment contract. Breach of contract and fraud in employment relationship where retailer claimed willful failure to construct and lease grocery store to retailer. Affirmed, 506 So.2d 317 (Ala. 1987).

Best Plant Food Products, Inc. v. Cagle 972,000

Fertilizer. Potato farmer brought action against seller for deceit, fraud and breach of warranty. Jury returned a general verdict for $972,000. Affirmed, 510 So.2d 229 (Ala. 1987).

Rollison Logging Company v. John Ellis 921,584

Fraud. Alleged fraud involving proposed purchase of logging equipment. Compensatory damages of $78,416 and punitive damages of $921,584. Remitted to $200,000. CV-84-03 (Cherokee County, May 12, 1986).

Jimmy Wayne Fountaian v. Aetna Casualty & Surety 720,000

Product liability. Failure to warn. Plaintiff suffered severance of 1½ fingers in a wire drawing machine. General verdict (compensatory and punitive) of $750,000 including specials of $30,000. CV-84-18 (Lauderdale County, August 18, 1986). Settled on appeal.

Griggs v. Northrup King and Alabama Feed Serv. 600,000

Product liability. Bad feed. Defendant delivered old seed instead of feed, and plaintiff's cattle suffered problems. Verdict of $700,000 including $100,000 actual damages and $600,000 punitive damages. CV-85-4956 (Jefferson County, 1986).

Harmon v. Motors Insurance Corp. 500,000

Automobile sale. Purchaser sued dealer and insurance company for fraudulently inducing car purchase by false assurances that plaintiff would qualify for insurance. Punitive damages remitted to $40,000 by trial court, finding that economic impact would be devastating to defendant car dealer. (Calhoun County) (493 So.2d 1370, after remand, 525 So.2d 411 (1987). Affirmed subject to remittitur.

Johnson & Associates, Inc. v. Rivers Construction Co. 500,000

Construction. Fraud. Construction company sued property owner for fraud and breach of contract. Compensatory damages $165,000. (Marion County, 1986). Affirmed on appeal, 532 So.2d 618 (Ala. 1988).

North Carolina Mut. Life Ins. Co. v. Holley 500,000

Insurance. Bad faith. Failure to pay $2,000 life insurance claim. Remitted to $500,000 by Alabama Supreme Court, 533 So.2d 497 (Ala. 1987).

A.L. Williams & Assoc. v. Williams et al. 400,000

Assault. Employee sued for injuries received from assault by supervisor, also alleging outrage, interference with business, etc. General verdict of $500,000 treated by court as including $100,000 compensatory damages. (Madison County, 1986) Reversed due to inconsistent verdicts, 517 So.2d 596 (Ala. 1987).

State Farm Fire & Cas. Ins. Co. v. Lynn 250,000

Insurance. Fraud. Verdict of $250,000 punitive damages, $25,000 compensatory. Alabama Supreme Court ordered $4,078 of remittitur of compensatory award and affirmed, 516 So.2d 1373 (Ala. 1987).

Kabel v. Brady 162,500

Chiropractor. Fraud. He represented that Medicare would cover services performed. Verdicts of $162,000 punitive damages, $609 compensatory. Affirmed, 519 So.2d 912 (Ala. 1987).

Dependable Ins. Co. v. Kirkpatrick 150,000

Insurance. Conversion. Alleged conversion of vacation cabin and its contents. Verdict of $150,000 punitive damages. Affirmed, 514 So.2d 804 (Ala. 1987).

John Hancock Variable Life Ins. Co. v. Pierce 150,000

Insurance. Fraud. Failure to pay on life policy. Insured failed to disclose preexisting conditions and insurer denied $200,000 claim. Verdict of $350,000 including $150,000 in punitive damages. (Mobile County, 1986)

Affirmed on rehearing after remand, 530 So.2d 719 (Ala. 1987), cert. denied, 486 U.S. 1032 (1988).

Hayes v. Payne 140,000

Business tort. Breach of contract and fraud arising out of sale of stock in a fabricating company. Affirmed on return after remand, 523 So.2d 333 (Ala. 1987).

Miller v. Equitable Life Assur. Society 116,000

Insurance. Agent fraud. Agent allegedly misrepresented terms of policy including amount of premiums. CV-86-296-PII (Montgomery County, September 24, 1986) Judgment satisfied.

Donnell Welch v. Kenworth of Dothan, Inc., et al. 100,000

Trailer sale. Buyer sued seller and manufacturer alleging fraud in delivery of 1982 trailer when buyer had sought a 1984 model and manufacturer's certificate of origin reflected 1984 trailer. Jury awarded $9,000 in compensatory damages. CV-84-417S (Houston County, November 6, 1986). Affirmed on appeal, 519 So.2d 502 (Ala. 1988).

1986

(Wrongful Death)

Beck, Murray, Tull v. Piper Aircraft, et al. 5,175,000

Product Liability. CV-83-6266 (Jefferson County 1986).

Black Belt Wood Co. v. Sessions 3,500,000

Motor vehicles. Trucking. Motorist killed when log fell from passing truck and crushed his vehicle. Suit against owner and loader of logs. (Jefferson County,

1986) Important case of non-apportionment of punitive damages. Affirmed, 514 So.2d 1249 (Ala. 1987).

Patricia L. Crandall, et al. v. Rudolph B. Williams 3,000,000

Automobile accident. Personal injury and wrongful death actions arising from automobile accident involving drunk driver and social host liability. One deal—$500,000, one general verdict for personal injury, $250,000 including punitive damages. (Madison County) Affirmed on return to remand, 514 So.2d 12 (1987).

Moore v. Alabama Gas Corp. 1,250,000

Landlord liability. Wrongful death from carbon monoxide poisoning in rental unit. CV-86-323-G (Montgomery County, December 5, 1986) Appeal dismissed.

Curry, Estate of v. Alabama Gas, et al. 1,250,000

Wrongful death. CV-86-323-G (Montgomery County, December 5, 1986).

1985

(Non-Wrongful Death)

Holt v. State Farm Mutual 25,000,000

Insurance. Fraud. Alleged fraudulent suppression of insured's right to stack uninsured motorist coverage on a $10,000 contract claim. Pattern of practice evidence. CV-82-686 (Clay County, 1985) Settled post-trial.

McMillan v. Massey Ferguson, Inc. et al. 10,000,000

Product liability. Partial leg amputation caused by grain auger. General verdict of $10.5 million which included $584,000 actual damages. CV-82-686 (Mobile County, 1985). Settled pending appeal.

Pasquale Food Co. v. Shakey's Inc. 3,000,000

Business tort. Punitive damages for intentional interference with business relationship and improper acquisition of trade secrets. C-82-2606 (Jefferson County, 1985).

AmSouth Bank v. Speigner 1,000,000

Lender liability. Wrongful completion, cashing of $25,000 check. Settled on appeal. (Elmore County, 1985) Affirmed, 505 So.2d 1030 (Ala. 1986).

Mobile Dodge, Inc. v. Alford 125,000

Automobile sales. General verdict of $125,000 including punitive damages for fraud by used car dealer. (Mobile County, 1985) Affirmed, 487 So.2d 866 (Ala. 1986).

1985

(Wrongful Death)

May v. Lloyd Noland Foundation 4,000,000

Medical liability. Wrongful death of baby. CV-79-583 (Jefferson County). Settled post-trial.

Wright v. Superior Gas 3,600,000

Wrongful death. Settled post-trial. CV-84-87 (Macon County) Appeal dismissed, 482 So.2d 299 (1985).

Hudson v. K&S Industries, Inc. 2,000,000

Wrongful death. CV-84-593 (Montgomery County, 1985).

Treadwell Fund, Inc. v. Campbell 1,000,000

Automobile sale. Misrepresentation involving condition of used pickup truck which had defect in accelera-

tor, which caused spontaneous acceleration, running over defendant. (Mobile County, 1985) Aff'd by Alabama Supreme Court, 485 So.2d 312 (Ala. 1986). Appeal dismissed by U.S. Supreme Court, 486 U.S. 1028 (1988).

Alabama Power Co. v. Cantrell 1,000,000

Electric utility. Decedent moving television antenna which contacted uninsulated power line. (St. Clair County) Affirmed by Alabama Supreme Court, 507 So. 2d 1295 (Ala. 1986). Appeal dismissed by U.S. Supreme Court, 486 U.S. 1028 (1988).

Dunaway v. Alabama Power Company 500,000

Premises liability. Action against lessor of marina where child drowned. CV-84-650-PR (Montgomery County, December 13, 1985) Reversed, 502 So.2d 726 (Ala. 1987).

1984

(Non-Wrongful Death)

American Pioneer Life Ins. Co. v. Sandlin 3,000,000

Insurance. Agent fraud. Verdict of $3 million punitive damages for fraud involving $100,000 compensatory damages. (Marion County) Affirmed, 470 So.2d 657 (Ala. 1985).

Alabama Power Co. v. Beam 250,000

Workplace safety. Verdict for failure to provide safe place to work. Affirmed, 472 So.2d 619 (Ala. 1985).

Cooper Chevrolet, Inc. v. Chambers 150,000

Automobile sale. Intentional fraud in sale of used car. Verdict of $150,000 punitive damages. Affirmed, 529 So.2d 913 (Ala. 1985).

1984

(Wrongful Death)

General Motors Corp. v. Edwards 4,000,000

Product liability. Crashworthiness claim involving deaths of two occupants of vehicle struck from behind. (Jefferson County) Remitted by trial court to $1.4 million each. Affirmed, 482 So.2d 1176 (Ala. 1985).

Murray Hill, Administrator v. Jack Gilmore et al. 1,250,000

Landlord liability. Estate of tenant who died in apartment fire alleged that apartment contained faulty heater and no smoke detector. (Mobile County, 1984) Settled after trial.

1983

(Non-Wrongful Death)

Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery 4,000,000

Lender liability. Fraud involving breach of loan commitment. (Montgomery County, February 9. 1983).

Aetna Life Ins. Co. v. Lavoie 3,000,000

Insurance. Bad faith. Refusal to pay $1,650 medical claim after partial payment. (Mobile County) Affirmed by Alabama Supreme Court, then vacated on appeal to U.S. Supreme Court and thereafter remitted to $500,000 by Alabama Supreme Court and affirmed, 505 So.2d 1050 (Ala. 1987).

Langston v. Osborne Truck Lines, Inc. 2,581,000

Motor vehicle. Trucking. Verdict of $2,581,000 punitive plus compensatory damages for injuries suffered in a traffic accident. ($1,525,000 to one plaintiff); ($1,000,000 to one plaintiff); ($56,000 to one plaintiff). Three plain-

tiffs; two severely injured, one suffered minor injuries. Affirmed, 454 So.2d 1317 (Ala. 1984).

Elting Center Corp. v. Owens Corning Fiberglass 1,557,000

Construction contract. Fraud, breach of express warranty for failure of roof on shopping center. (Lauderdale County, April 3, 1983).

Nationwide Mut. Ins. Co. v. Clay 1,250,000

Insurance. Bad faith. Insurer's refusal to pay $40,000 disability claim to lawyer suffering from cataracts. (Mobile County, 1983) Affirmed, 469 So.2d 533 (Ala. 1985); judgment vacated, U.S. (1985); reaffirmed, 525 So.2d 1339 (Ala. 1987)

1983

(Wrongful Death)

Williams v. Alabama Power Company 3,500,000

Electric utility. Admiralty case involving wrongful death of both parents of a 9-year old girl. Parents were killed when sailboat mast contacted overhead power line. (Mobile County, 1983)

Deaton, Inc. v. Burroughs 835,000

Motor vehicle. Trucking. Wantonness alleged for improperly loaded truck resulting in wrongful death. Verdict of $835,000 affirmed, 456 So.2d 771 (Ala. 1984).

1982

(Non-Wrongful Death)

National Sec. Fire & Gas Co. v. Bowen 1,500,000

Insurance. Landmark case. Outrage and malicious prosecution; verdict of $1,500,000 affirmed where special

damages were about $50,000, 447 So.2d 133 (Ala. 1983).

1982

(Wrongful Death)

Hicks v. Ireland 25,000,000

Medical liability. Alleged improper release of mentally ill patient who murdered plaintiff's decedent. Remanded to circuit court for orders in furtherance of settlement, 430 So.2d 438 (1983).

1981

(Wrongful Death)

Drs. Lane, Bryant, et al. v. Otis 5,000,000

Medical liability. Suit against anesthesiologist for death resulting from complications with anesthesia (anesthetist failed to diagnose the developing complications). Affirmed, 412 So.2d 254 (Ala. 1982).

Estes Health Care Centers Inc. v. Bannerman 500,000

Medical liability. Mentally retarded child died after complication developed from scalding bath given by nurse. Affirmed, 411 So.2d 109 (Ala. 1982).

APPENDIX F

SUPREME COURT OF ALABAMA

1931516

MARY HUFF

v.

UNITED INSURANCE COMPANY OF AMERICA, *et al.*

Appeal from Jefferson Circuit Court
(CV-93-5510)

May 26, 1995, Released

JUDGES: INGRAM, Maddox, Almon, Houston, and Butts, JJ., concur.

OPINION

INGRAM, JUSTICE.

John McClanahan, an agent of United Insurance Company of America ("United"), sold a life insurance policy to John Huff, providing coverage for both John Huff and his wife, Mary Huff. When Mr. Huff died, United denied payment of benefits under the policy, because Mr. Huff had made misstatements about his health on the policy application. Mrs. Huff sued United and McClanahan, alleging fraud, breach of contract, bad faith refusal to pay, and other claims. The trial court entered a sum-

mary judgment in favor of United and McClanahan on all claims. Mrs. Huff [1] appeals from the judgment as to her claims alleging fraud.

On a motion for summary judgment, the burden is initially on the movant to make a prima facie showing that there is no genuine issue of material fact (i.e., that there is no dispute as to any material fact), and that the movant is entitled to a judgment as a matter of law. Rule 56, Ala.R.Civ.P.; McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957 (Ala. 1992); Elgin v. Alfa Corp., 598 So. 2d 807 (Ala. 1992). "The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing that there is no such issue of material fact." McClendon, at 958; Elgin, at 810-11.

Rule 56 must be read in conjunction with the "substantial evidence rule," § 12-21-12, Ala. Code 1975, for actions filed after June 11, 1987. See Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). In order to defeat a defendant's properly supported motion for summary judgment, the plaintiff must present substantial evidence, i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). This Court reviews the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So. 2d 359 (Ala. 1993).

In early 1993, McClanahan made several visits to Mr. and Mrs. Huff's home for the purpose of selling a United life insurance policy. According to Mrs. Huff, McClana-

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[1] Pursuant to Ala. R. App. P., Rule 43(a), Mrs. Huff's attorney has informed the Court that she has died during the pendency of this appeal.

han's sole communication with her about the policy was to speak with her about the cost of potential premiums on the policy; she said McClanahan gave her no other information. At that time, Mrs. Huff, apparently speaking for both herself and Mr. Huff, told McClanahan that they were not interested in purchasing the policy. However, Mr. Huff later, without Mrs. Huff's knowledge, bought a policy from McClanahan providing life insurance coverage for both himself and Mrs. Huff. The policy application contained questions concerning both his and Mrs. Huff's health. No health problems for either were indicated on the completed application. However, Mr. Huff had previously been treated for heart problems, while Mrs. Huff had suffered from diabetes and its complications, including blindness. The application appeared to be signed by both Mr. and Mrs. Huff. Mrs. Huff denies that she signed the application; however, she also states that she had authorized Mr. Huff to sign her name for her in the past, because of her blindness. Concerning her knowledge of the circumstances surrounding the purchase of the policy, Mrs. Huff responded as follows:

> "Q. . . . Do you remember any application for life insurance with United?
>
> "A. No.
>
> "Q. So there is no way for you to tell us what your husband might have told Mr. McClanahan?
>
> "A. No.
>
> "Q. And there's no way for you to tell us what Mr. McClanahan might have told your husband?
>
> "A. No.
>
> "Q. And you didn't tell Mr. McClanahan anything, did you?
>
> "A. I did not.
>
> "Q. And he didn't tell you anything?
>
> "A. No. He just explained to me about the premium of the insurance.

"Q. But that was sometime before when you told him that you didn't want any insurance, is that right?

"A. Right.

"Q. So, Mr. McClanahan never did tell you anything about this policy, which was actually issued, did he?

"A. No.

". . . .

"Q. [McClanahan] didn't tell you anything about this policy that was issued that was untrue, did he?

"A. No.

"Q. He just didn't tell you anything one way or another, right?

"A. No. That's right, yes."

Shortly after United issued the policy, Mr. Huff died of a heart attack. Mrs. Huff learned of the policy after his death, and she submitted a claim for the policy's death benefit. Upon investigating Mr. Huff's medical history, United discovered his medical records indicating cardiovascular disease and refused to pay the death benefit. Mrs. Huff then filed this action.

A prima facie fraud claim has at its heart a misrepresentation concerning a material fact, either by an affirmative statement or act, or by a concealment or suppression. Reynolds v. Mitchell, 529 So. 2d 227 (Ala. 1988); Cowen v. M.S. Enterprises, 642 So. 2d 453 (Ala. 1994). The fraud claims asserted here are based only upon an alleged fraud directed towards Mrs. Huff. Consequently, an alleged misrepresentation must have been made to, and relied upon by, Mrs. Huff, or else facts must have been concealed from her that United and McClanahan had a duty to disclose. North Carolina Mut. Life Ins. Co. v. Holley, 533 So. 2d 497 (Ala. 1987); Crowder v. Memory Hill Gardens, Inc., 516 So. 2d 602 (Ala. 1987).

This fact situation illustrates an all-too-common situation for Alabamians in life insurance transactions. United issued the policy without investigating the applicants' health. As the law in Alabama currently stands, an insurance company may issue a life insurance policy with its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history. The benefits from this type of transaction lie solely in favor of the insurance company and its agent. The insurance company receives premiums month after month, while the agent retains a commission from the sale. But when the insured dies, the insurance company refuses to pay the benefits provided by the policy. Its refusal is based upon its discovery, for the first time, that the insured's health was poor. When the policy is sold, an agent is not required to delve thoroughly into the applicant's background for the details of his health history. Such a requirement could prevent situations like the one in this case.

In Miller v. Dobbs Mobile Bay, Inc., [Ms. 1921552, February 25, 1995] So. 2d (Ala. 1995), this Court held that an insurance company was bound by the actions of its agent, when the agent knew of the applicant's adverse health history and yet sold the policy without regard to that knowledge. As was adeptly stated by the Mississippi Supreme Court in Southern United Life Ins. Co. v. Caves, 481 So. 2d 764, 768 (Miss. 1985), an insurance company "manifests an intention to 'insure the world' " when, with no effort to establish guidelines for its agents, it merely relies on its agents' judgment to ascertain the health of applicants when deciding whether to issue a policy. There was no evidence that McClanahan specifically knew of Mr. Huff's poor health when he sold him the policy. However, had United been required to investigate Mr. Huff's medical history before issuing the policy, it most likely would not have issued it, and this lawsuit probably would not have been filed. Undoubtedly, it would be in the interests of the insurer, the applicant,

and judicial economy for the insurer to investigate the applicant's health history before issuing a policy. Apparently, though, until that is required, the sale of this type of life insurance policy with no serious attempt to determine the applicant's true health history will continue, to the frustration of "beneficiaries" of the deceased.

Nonethless, after reviewing the record, we must conclude that the trial court properly entered the summary judgment for United and McClanahan. Mrs. Huff presented no substantial evidence that United or McClanahan made any misrepresentation to her regarding the insurance policy. As noted above, she stated that she did not learn that Mr. Huff had purchased the policy until after his death. Mrs. Huff's own testimony, quoted above, indicates that no representations were made to her about the United policy except those concerning the policy premiums, which are not at issue. Furthermore, she presented no substantial evidence that United and McClanahan fraudulently suppressed any material facts. The mere fact that Mrs. Huff was unaware that her husband had purchased life insurance, without more, would not support a finding of fraudulent suppression. We further note that United refused to pay the death benefit solely because of the falsity of Mr. Huff's statements about his health on the application. Those statements on the application concerning Mrs. Huff's health were not involved in United's decision to deny payment. Although Mrs. Huff contends that her signature was forged on the application, she failed to show, even if the signature was forged, how she was proximately damaged by the fact that her name was signed on the application. Her name on the application was entirely unrelated to United's refusal to pay on Mr. Huff's policy.

Bare argument or conjecture does not satisfy the nonmoving party's burden to offer substantial evidence to defeat a properly supported summary judgment motion. Riggs v. Bell, 564 So. 2d 882, 884 (Ala. 1990). Mrs.

Huff presented no substantial evidence to rebut United and McClanahan's prima facie showing that no genuine issue of material fact existed as to her fraud claims. Therefore, we must affirm the judgment of the trial court.

AFFIRMED.

Maddox, Almon, Houston, and Butts, JJ., concur.